4 Original

118-610

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1885.

PHENIX INSURANCE COMPANY ET AL.

vs.

CHARLES E. DYER, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN.

IN RE PETITION OF GOODRICH TRANSPORTATION COMPANY TO LIMIT ITS LIABILITY UNDER ACT MARCH 3, 1851.

PETITION AND RECORD

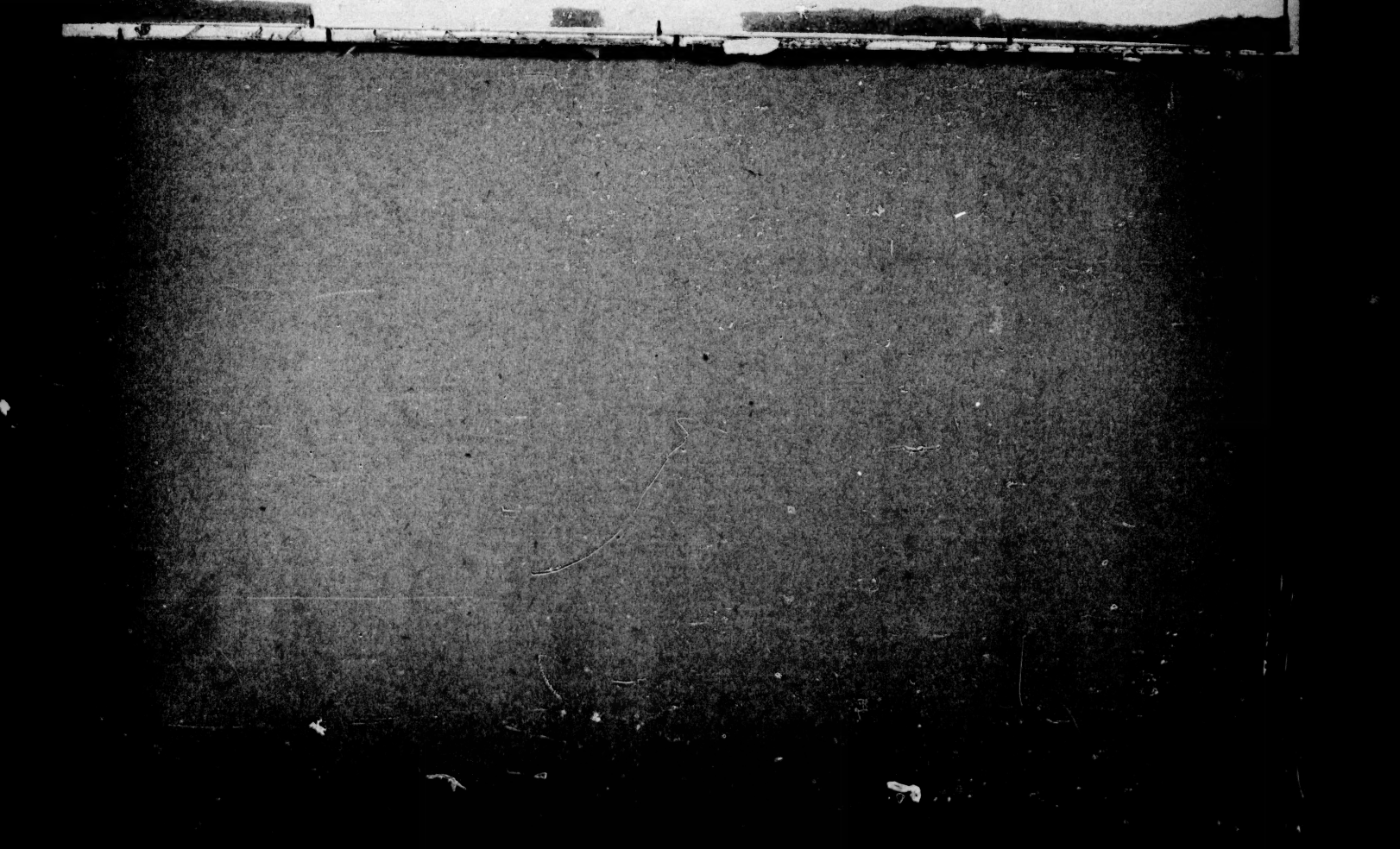
FOR WRIT OF PROHIBITION.

ROBERT RAE,

PROCTOR FOR PETITIONERS.

BARNARD & GUNTHORP, LAW PRINTERS, 44 & 46 LASALLE ST., CHICAGO

START OF ROLL



IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1885.

PHENIX INSURANCE COMPANY ET AL.

vs.

CHARLES E. DYER, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN.

IN RE PETITION OF GOODRICH TRANSPORTATION COMPANY TO LIMIT ITS LIABILITY UNDER ACT MARCH 3, 1851.

PETITION AND RECORD

FOR WRIT OF PROHIBITION.

INDEX.

	Page.
Petition and suggestion for writ of prohibition	1
Petition of Goodrich Transportation Company to limit liability in District court	6
Record	6
Answer to same	11
Order overruling motion to dismiss petition for want of jurisdiction.	18
Order appointing appraisers	19
Certificate of clerk to the record of the District court	20

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1885.

PHENIX INSURANCE COMPANY ET AL.

vs.

CHARLES E. DYER, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN.

IN RE PETITION OF GOODRICH TRANSPORTATION COMPANY TO LIMIT ITS LIABILITY UNDER ACT MARCH 3, 1851.

PETITION AND RECORD

FOR WRIT OF PROHIBITION.

INDEX.

	Page.
Petition and suggestion for writ of prohibition	1
Petition of Goodrich Transportation Company to limit liability in District court	6
Record	6
Answer to same	11
Order overruling motion to dismiss petition for want of jurisdiction.	18
Order appointing appraisers	19
Certificate of clerk to the record of the District court	20

October Term, A. D. 1885.

To the Honorable Morrison R. Waite, Esq., Chief Justice, and the Associate Justices of the Supreme Court of the United States at Washington:

The petition and suggestion of the Phenix Insurance Company of Brooklyn, in the State of New York, a corporation, organized and existing by virtue of the laws thereof, and Maximillian Gagnon, Joseph Leish, John Atkinson, James McDowell, and the First Presbyterian Church of Green Bay, citizens of the city of Green Bay, in the State of Wisconsin, give this honorable court now here to understand and be informed, that on the 14th day of January, 1886, the Goodrich Transportation Company, a joint stock corporation, being organized and existing under the laws of the State of Wisconsin, filed its petition in the United States District court for the Eastern district of Wisconsin on the instance side thereof, in admiralty, before the Honorable Charles E. Dyer, the judge of said court, to limit its liability under the act of Congress dated the 3d of March, 1851, entitled, "an act to limit the liability of ship owners," known as sections 4,283 and 4,284 of the Revised Statutes of United States, title 48, chapter 6.

The said petition among other things alleges, that the Transportation Company was at the time of filing its petition, and prior to the 20th of September, 1880, engaged in the business of commerce and navigation upon Lake Michigan and other great lakes and navigable waters connected therewith, and as such was the owner
of the steamer Oconto, a vessel of upwards of twenty tons
2 burden, duly enrolled and licensed for the coasting trade and employed by said owner in the business of commerce and navigation upon the great lakes and the navigable waters connecting the same. That the city of Green Bay is situated on Fox river at a point where the river flows into Green Bay. That on the 20th of September, 1880, the steamer Oconto while on one of her regular voyages from the port of Chicago, entered the harbor of the said city of Green Bay, and having passed up beyond a certain old planing mill in said city, standing on or near the bank or harbor of said river, a fire broke out therein which spread and was communicated

to a large number of other buildings in said city, some of which were totally, and others partially destroyed and damaged by said fire, aggregating about sixty-seven buildings, at a loss to their several owners of not less than $75,000. That in addition to the loss and destruction of said buildings there was a large amount of goods, chattels and property contained in them which were destroyed by said fire, of the aggregate value of about $25,000. That the whole amount of the value of said buildings and their contents greatly exceed the value of the steamer Oconto at the time of said fire, together with her freight then pending; the value of said steamer being about $12,000, and the amount of her freight then pending about $400. That some of said buildings and property were insured in the Phenix Insurance Company.

That the respective owners of said buildings, goods, chattels and property so lost and destroyed, as well as the insurers thereof, insist that the said fire was negligently communicated to said planing mill from said steamer Oconto, and that the petitioner became
4 and was liable for all the loss and damage occasioned by said fire.

That several of such owners have instituted suit against petitioner, which are now pending in the Circuit courts of Outagamie and Winnebago counties, in the State of Wisconsin, to recover the damages claimed to have been sustained by them respectively, in which suits the said Phenix Insurance Company was joined as coplaintiff with the following named persons and parties respectively in separate suits, to wit:

Maximilian Gagnon, Joseph Leish, John Atkinson, James McDowell, the First Presbyterian Church of Green Bay.

That the suit brought by Atkinson and the Phenix Insurance Company was prosecuted to a trial, resulting in recovery of judgment against your petitioner, on or about the 27th day of March, 1885, for the sum of $2,570 and costs, of which said judgment petition took an appeal to the Supreme court of the State of Wisconsin, which appeal is now pending and undetermined.

The petition further shows that it denies its liability for any loss or damage occasioned by said fire, but that if so liable, said fire originated and said losses were done and incurred without its privity or knowledge, and it desires as well to contest its liability for such losses and damages, as also to claim the benefit of sections 4,283 and 4,284 of Revised Statutes of United States, contained in chapter entitled "Commerce and Navigation," and to limit its liability, if any, the amount of the value of said steamer Oconto and her freight, then pending, and offers to enter into a stipulation, with sureties to be approved by the District court, for the pay-
5 ment of the value of said steamer and the amount of the

then pending freight, into the court whenever it may be ordered so to do.

The petition then prays the prayer for relief, according to the rules of this honorable court in such cases made and provided.

That on the 16th day of January, 1886, an order was made in said petition and issued out of said honorable court, to be served on your petitioners, to appear before said court on the first Monday of February, 1886, and show cause if any, why the prayer of said petitioner, the Goodrich Transportation Company, should not be granted, a copy of which is hereto attached and marked Exhibit "A" and made part of the petition. That afterwards, to wit: on the 1st day of February, 1886, an answer was filed by your petitioners, which, among other things, set up that the said real estate and the property thereon destroyed, belonging to them, were not situated on the shore or wharf of Fox river, but was wholly in the body of the city of Green Bay, and at a great distance from any navigable stream or other waters within the jurisdiction of the United States, all of which would more fully appear by the plat thereunto attached, the lots being marked thereon in red lines. That on the 20th of September, 1880, the Goodrich Transportation Company, owner of the steamer Oconto, so unskillfully and negligently built and equipped said steamer that said steamer had no spark arrester or contrivance for preventing the escape of sparks and fire from the smoke-stack of said boat, the neglect of which was the occasion of the fire. That said steamer had been lying at her wharf at Green Bay, and that her master caused her to
6 leave it to go to a neighboring wharf, some distance up the stream, when a gale blowing over and from said steamer towards the city of Green Bay, caused her to throw out large quantities of cinders and other combustible matter onto the shores, wharves and buildings situate in said city, the master taking no precautions to prevent such cinders from setting fire to said city. That there was in force at that time an ordinance of said city making it unlawful to employ any steamboat within the corporate limits of the city without the steamer being equipped with a spark catcher, or other equivalent device. That in consequence the buildings and their contents, as shown on the plat attached to the answer, were destroyed by fire communicated from said steamer.

The answer further puts in a plea to the jurisdiction of the court because the matters and things set forth, and the liability, if any, accrued by reason of a tort committed on land to real estate within the limits of a sovereign state and within the body of a county, and not upon the high seas, the great lakes, or any waters connecting the same, or upon any navigable waters of the United States. That the matters and things complained of are purely of common law

cognizance, and of common and constitutional right, triable by a jury, according to the rules, practices and principles of the common law and not by a commissioner appointed under said admiralty rules applicable to admiralty proceedings. A copy of which answer is hereto attached, marked Exhibit "B" and made part of this petition.

That afterwards, to wit: on the 9th day of March, 1886, the cause coming on before the said judge, the said court over-
7 ruled the plea to said jurisdiction, and decided to take jurisdiction of said cause, and to pronounce against the respondents; that the said judge, in pursuance thereof, caused the following orderto be made:

This day came the parties, by their proctors, and on consideration of the motion of respondents, the Phenix Insurance Company *et al.*, that this petition be dismissed for want of jurisdiction, it is ordered by the court that said motion be and is hereby overruled. That afterwards, to wit: on the 15th day of March, A. D. 1886, the following proceedings were had, to wit:

And now comes the petitioner, by its counsel, and comes also Robert Rae and Charles E. Vroman, of counsel for the several plaintiffs in the suits mentioned in the petition filed herein, and who appear in opposition to said petition, and it appearing to the court now here that due notice had been given all parties in interest, by publication as directed under the previous order of the court, and thereupon the said matter coming on to be heard upon the motion upon said petition, and this cause having been submitted to the court upon said petition, and the answers and objections of the said plaintiffs in the said several suits in said petition mentioned, and upon the arguments of counsel, and the court being now well and sufficiently advised of and concerning the said motion, it is now here ordered and adjudged that the prayer of said petition be, and the same is hereby granted, and the court now here orders and directs that J.V. Tuttle, George M. Tibbits and W. H. Wolf be, and they are hereby appointed appraisers to appraise the value of the said steamer Oconto, her tackle, apparel and furniture as it was on the 20th day of September, 1880, with the value of her freight earned on her said voyage from Chicago, Illinois, to Depere, Wisconsin, as mentioned in the petition filed in said cause, and report the same to this court, with all convenient speed, which said appraisement and valuation shall be made under oath and in accordance with the rules and practice of this court in admiralty.

(Signed) CHAS. E. DYER, *Judge.*

A copy of which is hereunto attached and marked Exhibit "C," and made part of this petition.

Your petitioners would further show, that, notwithstanding the premises, the said honorable judge of the said United States District court proposes to go on and make a final decree in said cause in accordance with the said order entered on the day and year last aforesaid.

8 Wherefore the said petitioners most respectfully pray remedy by writ of prohibition to be issued out of this honorable court to the said judge of the District court of the United States for the Eastern District of Wisconsin, to be to him directed prohibiting him from holding the plea and premises aforesaid further before him or in any way proceeding to give the relief prayed for in said petition of the said Goodrich Transportation Company.

And your petitioners will ever pray.

THOMAS R. BURCH,
General Agent of Phenix Insurance Company.
MAXIMILLIAN GAGNON,
JOSEPH LEISCH,
JOHN ATKINSON,
JAMES MCDOWELL,
FIRST PRESBYTERIAN CHURCH
OF GREEN BAY.

ROBERT RAE,
Proctor for Petitioners.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } ss.

Thomas R. Burch, being duly sworn, says that all and singular the facts stated in this petition are true to the best of his knowledge and belief.

Sworn and subscribed before me this 23d day of March, 1886.

[SEAL.] CHARLES V. NICODEMUS,
Notary Public in and for the County of Cook and State of Illinois.

9 DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF WISCONSIN. } ss.

At a stated term of the District court for the United States for the Eastern district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district, on the first Monday (being the fourth day) of January, A. D. 1886, present the Honorable Charles E. Dyer, judge of said court presiding, F. H. West, marshal, Edward Kurtz, clerk. Among other the following proceedings were had, to wit:

In the matter of the petition of the Gooodrich Transportation Company, in a cause of limitation of liability of the owners of the steamer Oconto. } *In Admiralty.*

Be it remembered, that on the 14th day of January, A. D. 1886, came the petitioner, The Goodrich Transportation Company, by its proctors, Messrs. Jenkins, Winkler, Fish & Smith, and filed its petition as follows:

10 UNITED STATES OF AMERICA,
EASTERN DISTRICT OF WISCONSIN. }

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

To the Hon. Charles E. Dyer, Judge of the District Court of the United States for the Eastern District of Wisconsin:

Your petitioner, the Goodrich Transportation Company, respectfully shows: That it now is, and on and prior to the 20th day of September, A. D. 1880, it was a joint stock corporation, duly organized and existing under the laws of the State of Wisconsin. That on the said 20th day of September, A. D. 1880, it was, and for a long time prior thereto, it had been and still is engaged in the business of commerce and navigation upon Lake Michigan and other great lakes and navigable waters connecting therewith, and was the owner of divers steamboats and propellers, which it used and employed in said business, among which was the steamer Oconto.

That the said steamer Oconto was, at the time aforesaid an American vessel of upwards of twenty tons burden, duly enrolled and

licensed for the coasting trade and was owned and employed by your petitioner in the said business of commerce and navigation upon said great lakes and other navigable waters connecting therewith. Said steamer not being a canal boat, barge or lighter,
11 and not being used in river or inland navigation. That Green Bay is a large body of navigable water, connecting with Lake Michigan, at the head of which bay is located the city and port of Green Bay, in the State of Wisconsin, at a point where Fox River flows into said bay. That said Fox River is a large, navigable stream, and the mouth of the same forms or constitutes the harbor at said port and city of Green Bay.

That on the said 26th day of September, 1880, while so employed and navigated by your petitioner, and while on one of her regular voyages from the port of Chicago, in the State of Illinois, the said steamer Oconto entered said harbor at the said city and port of Green Bay, and after having passed up beyond a certain old planing mill, in the said city, standing on or near the bank of said harbor or river, a fire broke out therein which spread and was communicated to a large number of other buildings in said city, some of which were totally and others partially destroyed and damaged by said fire; that the aggregate number of said buildings was about sixty-seven, as your petitioner is informed and believes, and the aggregate amount of loss and damage claimed to have been sustained by the several owners of said buildings, in consequence of said
12 fire, is not less than seventy-five thousand dollars, as your petitioner is informed and believes.

That in addition to the loss and destruction of said buildings there was a large amount of goods, chattels and property contained in said building which was destroyed by said fire, the aggregate value of which as claimed by the owners thereof, being not less than twenty-five thousand dollars, as your petitioner is informed and believes. That the whole amount of the value of said buildings, goods, chattels and property so destroyed greatly exceeds the value of said steamer at the time of said fire, together with her freight then pending. The value of said steamer being about twelve thousand dollars, and the amount of her freight then pending being about four hundred dollars; that some of said buildings and property were insured in the Phenix Insurance Company, and some in some other companies at the time of said fire, as your petitioner is informed and believes.

Your petitioner further shows that the respective owners of said buildings, goods, chattels and property so lost and destroyed, as well as the insurers thereof claimed that the said
13 fire was negligently communicated to said planing mill from your petitioner's said steamer Oconto, and that

Your petitioners would further show, that, notwithstanding the premises, the said honorable judge of the said United States District court proposes to go on and make a final decree in said cause in accordance with the said order entered on the day and year last aforesaid.

8 Wherefore the said petitioners most respectfully pray remedy by writ of prohibition to be issued out of this honorable court to the said judge of the District court of the United States for the Eastern District of Wisconsin, to be to him directed prohibiting him from holding the plea and premises aforesaid further before him or in any way proceeding to give the relief prayed for in said petition of the said Goodrich Transportation Company.

And your petitioners will ever pray.

THOMAS R. BURCH,
General Agent of Phenix Insurance Company.
MAXIMILLIAN GAGNON,
JOSEPH LEISCH,
JOHN ATKINSON,
JAMES MCDOWELL,
FIRST PRESBYTERIAN CHURCH
OF GREEN BAY.

ROBERT RAE,
Proctor for Petitioners.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF ILLINOIS. } ss.

Thomas R. Burch, being duly sworn, says that all and singular the facts stated in this petition are true to the best of his knowledge and belief.

Sworn and subscribed before me this 23d day of March, 1886.

[SEAL.]

CHARLES V. NICODEMUS,
Notary Public in and for the County of Cook and State of Illinois.

9 DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF WISCONSIN. } ss.

At a stated term of the District court for the United States for the Eastern district of Wisconsin, begun and held according to law, at the city of Milwaukee, in said district, on the first Monday (being the fourth day) of January, A. D. 1886, present the Honorable Charles E. Dyer, judge of said court presiding, F. H. West, marshal, Edward Kurtz, clerk. Among other the following proceedings were had, to wit:

In the matter of the petition of the Gooodrich Transportation Company, in a cause of limitation of liability of the owners of the steamer Oconto. } *In Admiralty.*

Be it remembered, that on the 14th day of January, A. D. 1886, came the petitioner, The Goodrich Transportation Company, by its proctors, Messrs. Jenkins, Winkler, Fish & Smith, and filed its petition as follows:

10 UNITED STATES OF AMERICA,
EASTERN DISTRICT OF WISCONSIN. }

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

To the Hon. Charles E. Dyer, Judge of the District Court of the United States for the Eastern District of Wisconsin:

Your petitioner, the Goodrich Transportation Company, respectfully shows: That it now is, and on and prior to the 20th day of September, A. D. 1880, it was a joint stock corporation, duly organized and existing under the laws of the State of Wisconsin. That on the said 20th day of September, A. D. 1880, it was, and for a long time prior thereto, it had been and still is engaged in the business of commerce and navigation upon Lake Michigan and other great lakes and navigable waters connecting therewith, and was the owner of divers steamboats and propellers, which it used and employed in said business, among which was the steamer Oconto.

That the said steamer Oconto was, at the time aforesaid an American vessel of upwards of twenty tons burden, duly enrolled and

licensed for the coasting trade and was owned and employed by your petitioner in the said business of commerce and navigation upon said great lakes and other navigable waters connecting therewith. Said steamer not being a canal boat, barge or lighter,
11 and not being used in river or inland navigation. That Green Bay is a large body of navigable water, connecting with Lake Michigan, at the head of which bay is located the city and port of Green Bay, in the State of Wisconsin, at a point where Fox River flows into said bay. That said Fox River is a large, navigable stream, and the mouth of the same forms or constitutes the harbor at said port and city of Green Bay.

That on the said 26th day of September, 1880, while so employed and navigated by your petitioner, and while on one of her regular voyages from the port of Chicago, in the State of Illinois, the said steamer Oconto entered said harbor at the said city and port of Green Bay, and after having passed up beyond a certain old planing mill, in the said city, standing on or near the bank of said harbor or river, a fire broke out therein which spread and was communicated to a large number of other buildings in said city, some of which were totally and others partially destroyed and damaged by said fire; that the aggregate number of said buildings was about sixty-seven, as your petitioner is informed and believes, and the aggregate amount of loss and damage claimed to have been sustained by the several owners of said buildings, in consequence of said
12 fire, is not less than seventy-five thousand dollars, as your petitioner is informed and believes.

That in addition to the loss and destruction of said buildings there was a large amount of goods, chattels and property contained in said building which was destroyed by said fire, the aggregate value of which as claimed by the owners thereof, being not less than twenty-five thousand dollars, as your petitioner is informed and believes. That the whole amount of the value of said buildings, goods, chattels and property so destroyed greatly exceeds the value of said steamer at the time of said fire, together with her freight then pending. The value of said steamer being about twelve thousand dollars, and the amount of her freight then pending being about four hundred dollars; that some of said buildings and property were insured in the Phenix Insurance Company, and some in some other companies at the time of said fire, as your petitioner is informed and believes.

Your petitioner further shows that the respective owners of said buildings, goods, chattels and property so lost and destroyed, as well as the insurers thereof claimed that the said
13 fire was negligently communicated to said planing mill from your petitioner's said steamer Oconto, and that

your petitioner became and were liable for and on account of all the loss and damage occasioned by the said fire; and several of such owners have instituted suit against your petitioner, which are now pending in the Circuit courts of the counties of Outagamie and Winnebago, in the State of Wisconsin, to recover the damages claimed to have been sustained by them respectively, in which suits the said Phenix Insurance Company was joined as a co-plaintiff with the following named persons and parties respectively in separate suits, to wit: Maximillian Gagnon, Joseph Leisch, John Atkinson, James McDowell, The First Presbyterian Church of Green Bay, and a suit brought by said insurance company and W. I. Crandall, which has been disposed of.

Your petitioner further shows that the said suit so brought by the said John Atkinson and the Phenix Insurance Company, was prosecuted to a trial resulting in the recovery of judgment against your petitioner on or about the 27th day of March, A. D. 1885, for the sum of about $2,570 and costs, besides of suit, from which said judgment your petitioner took an appeal to the Supreme court of said State of Wisconsin, which appeal is now pending and undetermined.

14 That all the other of said suits so commenced by the said parties are still pending in the said Circuit courts, except the one brought by W. I. Crandall and the said insurance company, which has been tried and a judgment rendered in favor of your petitioner therein.

Your petitioner further shows that a large number of other persons who claimed to have sustained like loss or damage to their buildings and property in consequence of said fire, who have not yet commenced suit against your petitioner, threatens to do so as your petitioner is informed and believes.

Your petitioner further shows that it denies its liability for any loss or damage occasioned by said fire, and insists that it, the said fire, did not originate from or was not negligently communicated from said steamer Oconto, but says that if it is so liable, that said fire originated and said losses and damages were done, occasioned and incurred without the privity or knowledge of your petitioner, the owner of said steamer Oconto. And it is desired as well to contest its liability and the liability of said steamer for such losses and damages as also to claim the benefit of sections 4,283 and 4,284 of the Revised Statutes of the United States, contained in chapter 6, title 48, "Commerce and Navigation," and limit the

15 amount of its liability for said losses and damages, for which they may be found liable, if any, to the amount of the value

of said Oconto and her freight then pending, and it, your petitioner, hereby offers to enter into a stipulation with sureties to be approved by this court for the payment of the value of said steamer, and the amount of her pending freight into this court, whenever it may be ordered so to do.

Your petitioner, therefore, prays that it may be declared to be entitled to, and that it may have the benefit of the provisions of the Revised Statutes of the United States, limiting the liability of the owners of vessels as provided by sections 4,283 and 4,284 of said statutes, title 48, chapter 6. And that the value of said steamer Oconto, her engine and boilers, tackle, apparel and furniture immediately after said fire, together with the amount of her freight then pending, may be ascertained or appraised under an order of this honorable court, and that your petitioner may, under the direction of this court, enter into a stipulation, with sureties, to pay the amount of the value of said steamer, and the amount of said freight then pending, into this court, whenever such payment shall be ordered or required, and
16 that a monition may issue against all persons claiming any damages of any kind for any loss, destruction, damage and injury occasioned by said fire, citing them to appear before this court and make due proof of their respective claims at a time to be named therein; and also that this court will designate some commissioner before whom such claims shall be presented in pursuance of said monition, and before whom your petitioners may appear and contest said claims, and its liability on account of any loss or damage occasioned by said fire; and that if upon the coming in of the report of said commissioners and confirmation thereof or otherwise, it should appear that your petitioner was not liable for any such loss, damage, destruction, or injury, it may be so finally decreed by this court, otherwise that the said moneys so secured to be paid into this court by such stipulation as aforesaid, may be divided *pro rata* among the several claimants in proportion to the amount of their respective claims. Your petitioner further prays that in the mean time and until the final judgment shall be rendered herein, or a final termination had, that this honorable court will make an order restraining the Phenix Insurance Company, Maximilian
17 Gagnon, Joseph Leisch, John Atkinson, James McDonell, and the First Presbyterian Church of Green Bay, from further prosecuting their respective suits against your petitioner; and in case the judgment so recovered by the said John Atkinson and the Phenix Insurance Company shall be reversed by the Supreme court of Wisconsin, that they be restrained from further prosecuting the same, also that all other persons having any such claims may

likewise be restrained from commencing any suits against your petitioner to recover the same; and that your petitioner may have such other or further relief as may be just and proper in the premises, and as this court shall be pleased to grant.

THE GOODRICH TRANSPORTATION COMPANY,
By T. G. BUTLIN, *President.*

JENKINS, WINKLER, FISH & SMITH,
Proctors for Petitioner.

STATE OF WISCONSIN, } ss.
COUNTY OF MILWAUKEE. }

Thomas G. Butlin, being first duly sworn, on oath deposes and says that he has heard the foregoing petition read and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters stated to be on information and belief, and as to those he believes them to be true, and that he is president of said petitioner, the Goodrich Transportation Company.

THOMAS G. BUTLIN.

18 Subscribed and sworn to before me,
this 26th of December, 1885.

GEO. G. GREEN,
Notary Public, Wis.

ORDER ON ABOVE PETITION.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

In the matter of the petition of the Goodrich Transportation Company in a cause of limitation of liability of the owners of the steamer Oconto. }

On the application of the petitioner by Jenkins, Winkler, Fish & Smith, their proctors, it is ordered by the court, this 16th day of January, eighteen hundred and eighty-six, that on the first Monday of February, being the first day of February, 1886, this court will hear the application of the petitioner to appoint appraisers of the value of the interest of the owners of the steamer Oconto in said vessel and the freight pending at the time of the fires at Green Bay on the 20th day of September, 1880, alleged to have been

caused by fire negligently commnnicated from said steamer Oconto as set forth in said petition, at which time all parties interested can appear and show cause, if any, why said application should
19 not be granted; and it is further ordered that a copy of this order be published daily until said hearing in the Milwaukee Sentinel, published at Milwaukee, Wisconsin, and that a copy of this order be served on the plaintiffs in the several suits in said petition described or upon their attorneys.

By the court,
CHAS. E. DYER, *Judge.*

February 1, 1886, answer of the Phenix Insurance Company and others, filed, as follows:

Answer.

20 UNITED STATES OF AMERICA,
EASTERN DISTRICT OF WISCONSIN,
UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF WISCONSIN. } *In Admiralty.*

In re-petition of the Goodrich Transportation Company of the State of Wisconsin, as owner of the steamer "Oconto," her engines, machinery, boilers, tackle, apparel and furniture, filed under rules 54 to 58, inclusive, of practice in admiralty, under the Act of March 3, 1851, entitled "An act to limit the liability of ship owners, and for other purposes," to limit its liability as owner of the steamer "Oconto," and to have appraisers appointed of the value of the interest to the owners of said steamer in said steamer, and the freight pending, on the 20th day of September, 1880, at the time of the fires at the city of Green Bay, in the State of Wisconsin, alleged to have been caused by fire negligently communicated from said steamer to the said property destroyed by said fire.

The respondent, the Phenix Insurance Company, of Brooklyn, New York, and the First Presbyterian Society of Green Bay, Maximillian Gagnon, John Atkinson, James McDonell, and Joseph Leisch, all of whom, except the Phenix Insurance Company, are citizens of the State of Wisconsin, and of the same state in
21 which the petitioner is created and exists as a corporation, and have been such citizens before, at, and since the said loss by fire occurred, in response to, and by virtue of, a notice served on them, and each of them, to show cause, if any, why said application should not be granted, respectfully represent:

That on the 20th day of September, there were in force divers policies of insurance, issued by the said Phenix Insurance Company against fire, covering houses and household furniture therein contained, in the city of Green Bay, and located as follows: The church building and parsonage of the said First Presbyterian Society, situate on lots number fourteen and sixteen (14 & 16), in block number fifteen (15), in said city of Green Bay, according to the recorded plat of "Astor."

Dwelling-house of Maximillian Gagnon, on lot number two (2), in block number twenty-three (23), according to said plat.

Property of John Atkinson, on lot No. 670, according to recorded plat of Navarino.

Property of James McDonell, on lot No. 504, according to said plat of Navarino.

Property of Joseph Leisch, on lot No. 214, according to said plat of Navarino; by which the same were insured for loss or damage by fire in favor of the said First Presbyterian Society of Green Bay, Maximillian Gagon, John Atkinson, James McDonell, and Joseph Leisch, as follows.

	The First Presbyterian Society church building	$2,500
22	Personal property in the same	500
	Parsonage	2,000
	Maxamillian Gagnon, dwelling-house	1,000
	John Atkinson, dwelling-house	700
	James McDonell, personal proper in dwelling-house	1,500
	Joseph Leisch, store and dwelling	1,500

by which the same were insured from loss or damage by fire in a large amount of money, to wit: Nine thousand seven hundred dollars.

Thst the value of the property so insured and uninsured, belonging to said respondents, and partly insured in the Phenix Insurance Company, amounts to the sum of $28,000, with interest from date of loss.

That said real estate and personal property thereon were not situated on the shore or wharf of Fox river; but were wholly in the body of the city of Green Bay, and at a great distance from any navigable stream, or other waters within the jurisdiction of the United States, all of which will more fully appear by the plat hereunto attached, and made part of this answer to said rule to show cause, etc., the lots being marked and the names of the respective owners thereof thereon written, being the ground upon which the dwelling-houses insured as aforesaid, and personal property therein situated, and damaged by the fire aforesaid, were located.

Respondents would further show, that petitioner is a cor-
23 poration, incorporated and existing under and by virtue of the laws of the State of Wisconsin, and is as such the owner of, and engaged in, the business of running a line of steamboats on the navigable waters within this said state.

That on or about the 20th day of September, A. D. 1880, the said petitioner, being the owner of and engaged in running the said line of steamboats at Green Bay, in the county of Brown, in this state, so unskillfully and negligently built, equipped, run and operated one of its said steamboats, the "Oconto," by failing and neglecting to have any spark arrester or contrivance for preventing the escape of sparks and fire from the smoke-stack of said boat, upon, attached to, or connected with the said boat, in any manner, and by negligently starting said steamboat from its wharf with the exhaust on the inside of said steamer's smoke-stack, within the city of Green Bay, in the Fox river, where she lay, the Green Bay shore of said river, being then and there covered by many old and dry wooden buildings of highly combustible character, a heavy wind then and there blowing across the course of said vessel from the south-west on to the Green Bay shore and negligently propelling said vessel up the Fox river within about forty rods of said Green Bay shore, quartering against said wind, under a heavy head of steam, the smoke-stack of said vessel in the meantime throwing
24 out large quantities of sparks and fire, said sparks, as could be plainly seen, being carried by the wind on to the shore among and on to said combustible wooden buildings, and manifestly endangering the same; that by said sparks so negligently thrown and scattered on shore, a fire was set among certain buildings near the upper or Mason street bridge, over the Fox river, in said city of Green Bay, to wit: a planing mill, so marked on said plat, and with the name "E. Morrow" thereon.

That said master, representing said petitioner, caused said steamer to leave her wharf at Green Bay, when a gale was blowing over and from said steamer and towards said city of Green Bay, which said gale, together with said exhaust being improperly inside of said smoke-stack, caused said steamer to throw out large quantities of sparks and fire, cinders and other combustible matter, and said master attempted to go up said stream to a neighboring wharf with said steamer, near to the wharves of the city of Green Bay, and negligently neglected to station any lookout on said steamer at the stern thereof, or on any other part or place on said steamer, where said lookout could detect and report any danger to the adjacent wharves or buildings thereon, by reason of said sparks and other combustible matter thrown out of the smoke-stack of said steamer, and carried by the high gale then prevailing on or into the

said city of Green Bay, and give the said master timely notice of any damage which would be likely to result therefrom, and which could have been prevented by such notice from said lookout so stationed and intelligently and attentively engaged in his business as lookout.

That, as the master and those in charge of said vessel well knew, or would have known had a proper lookout been properly stationed, that before the fires before mentioned, were set, several fires had caught on the shore from the sparks and other combustible matter thrown out by said vessel after she had left her wharf, and before she had reached the point aforesaid, notwithstanding which the petitioner negligently caused said vessel to continue with her exhaust on the inside of her smoke-stack, on her said voyage along the shore as above described.

That all of said matters happened within the city of Green Bay, a duly incorporated city of this state, duly authorized by its charter to regulate spark arresters on steam engines and steam vessels run or operated within its limits.

That there was in force at that time within the said city, duly passed by its mayor and council, an ordinance which, among other things, provided: "It shall not be lawful for any person or corporation "within this city to operate any steam engine, steam tug, steamboat, "propeller, mill, factory, or shop of any kind, whenever steam power "is used, without having first provided for the smoke-stack or chim-"ney thereof a sufficient spark-catcher, screen, or some other device, "to prevent the escape of sparks or burning cinders there-"from. Such spark-catcher, screen or other device shall be sub-"stantially attached in or upon such smoke-stackor chimney, "and shall be kept in good repair, so as to prevent the escape of "sparks or burning cinders therefrom, as effectually as the same "can be prevented by any means known or in use for that pur-"pose."

That said vessel was, at the time aforesaid, being run, equipped and operated negligently and unlawfully, in direct violation of such ordinance.

That from the fire so set by said vessel, the flames spread directly and proximately without the intervention of any other cause, to the frame buildings occupied as dwelling houses by the said respondents, and the personal property contained therein, which was thereby totally destroyed by the petitioner's said negligent and unlawful acts, being then and there the property of said respondents, as aforesaid.

These respondents would further answer that the several suits mentioned in said petition, commenced by these respondents against this petitioner, were commenced in the Brown county Circuit court

in the fall of 1880. To all of which said several suits a general denial to the merits was filed by said petitioners.

That the suit of the said John Atkinson and the Phenix Insurance Company against said petition, was heard at the city of Appleton, in the county of Outagamie, in the State of Wisconsin, in the
27 Outagamie county Circuit court, before the panel on the 21st of December, 1882, and a verdict was then and there had for the plaintiffs, and upon a judgment rendered thereon by the said court, and an appeal was prayed, allowed and perfected by said petitioner from the said Outagamie county Circuit court to the Supreme court of the State of Wisconsin, on the 23d day of May, 1883.

That at a subsequent term of the Supreme court of said state, to wit: the January term, 1884, such proceedings were had that said cause was remanded for trial *de novo*, and has since said date, on motion of said petitioner, a change of venue has been had to Winnebago county Circuit court in said State of Wisconsin.

That the suit of the said John Atkinson and the Phenix Insurance Company against the petitioner, was held at Oshkosh, in the Winnebago county Circuit court, before the panel on the day of February, 1885, and a verdict was then and there had for the plaintiffs, and upon a judgment rendered thereon by the said court, an appeal was allowed and perfected by said petitioner from said Circuit court to the Supreme court of the State of Wisconsin, on the day of December, 1885, which appeal is now pending in said Supreme court and undetermined.

That the case wherein the Phenix Insurance Company and the First Presbyterian Society of Green Bay are the plaintiffs
28 and the petitioner is the defendant, is fixed and set down for trial at Winnebago county Circuit court on the 12th day of February, 1886, and a jury has been summoned to try said cause.

That these respondents have gone to great expense to prepare said cause for trial, at that it will be unjust and inequitable to delay your respondents in the preparation for trial, or stay the trial of said cause.

Respondents would further show that since said cause was commenced in the said Brown county Circuit court, in the fall of 1880, said petitioner, without setting up or in any way seeking to avail itself of the benefits of the said act of March 3, 1851, has conducted itself with vexatious, dilatory motions, and changes of venue, as appears from the docket entered in said causes as follows, to wit:

Fire occurred September 20, 1880.

All actions commenced in fall of 1880 in Brown county.

All cases removed to United States court March 7, 1881, on application of defendant.

Remanded to Brown county circuit August 8, 1881.

Defendant appealed from order remanding cases to Supreme court of the United States.

This appeal was dismissed on stipulation and cases stood remanded. Place of trial changed on application of defendant April 15, 1882, to Outagamie county. June, 1882, called for trial and continued. December, 1882, Atkinson case was, on application of defendant June, 1883, called for trial and continued on application of defendant.

29 December, 1883, continued again on application of defendant. October, 1884, called for trial and change of venue taken by defendant to Winnebago. February, Atkinson case trial. May, 1885, called for trial and continued on application of defendants.

Application in United States District court for Eastern district of Wisconsin filed the 14th day of January, A. D. 1886, to limit its liability as owner of steamer Oconto, etc.

Respondents would further show that, during the progress of all these trials of said causes, they were put to great cost and expense, all of which are taxable costs, in case your respondents prosecute their said suits to judgment, and that the said petitioner has at no time pleaded any matter or thing, or in any way sought to limit its liability, or avail itself of the act of Congress of the 3d of March, 1851, entitled "An act to limit the liability of ship-owners and for "other purposes;" and that it would be manifestly unjust at this late day to permit it to do so, unless all such costs and expenses paid out and expended by respondents in this litigation, and which, if they were successful, would be taxable costs, are first refunded and paid them by said petitioner.

These respondents further allege that, after the said 20th day of September, 1880, the said petitioner, as owner of the said steamer "Oconto," engaged said steamer in many distinct and inde-

30 pendent voyages after the voyage ended upon which she was bound at the time of the injury complained of, and which liability therefor, which it seeks to contest, and if found liable to limit during the season of 1880, which closed on the 20th day of November thereafter.

And said petitioner did so employ said vessel on many voyages, all of which were independent adventures during the seasons of navigation for the years 1881 and 1885 inclusive, without seeking to avail itself of said act of Congress of March 3, 1851, and it thereby equitably abandoned its right so to do, but, on the contrary, conceded its liability for the damages incurred, if any, by reason of the loss mentioned in said petition, and your respondent insists that

it would be manifestly unjust after a delay of over five years to allow said petitioner or to compel your respondents to go back to said 20th of September, 1880, to ascertain and fix the then value of said steamer and her freight then pending.

These respondents further allege that, in the fall of 1883, the said petitioner sold the said steamer Oconto to Rensselaer Van Slyck and Gregor McGregor, of Port Huron; and the said vessel's home port now is at Detroit, and has been since said sale and purchase. That said petitioner has no further interest in said steamer, and that the steamer herself lies stranded off the Charity islands, near the mouth of Saginaw bay, in the State of Michigan, and on
31 Lake Huron, and is not within the jurisdiction of this honorable court. That said petitioner is guilty of laches.

Your respondents further claim that this Honorable court ought not to take jurisdiction of this petition, because the matters and things set forth, and the liability, if any, accrued by reason of a tort committed on the dry land to real estate in the body of a county and a sovereign state; that said real estate was situate in the city of Green Bay, and not upon the high seas, the great lakes, or any waters connecting the same, or upon any navigable waters of the United States. That the matters and things complained of are purely of common law cognizance, and of right triable by a jury, according to the rules, practice and principles of the common law, and not by a commissioner appointed under said admiralty rules applicable to said proceedings.

That, by reason of the premises herein set forth, respondents pray that said application of said petitioner to obtain the benefit of said act of the 3d of March, 1851, entitled "An act to limit the "liability of ship-owners," be refused, and said petition be dismissed with costs, and that respondents may have such other and further relief in the premises as this honorable court may deem they are entitled to receive.

And respondents will ever pray.

32 PHENIX INS. CO. BY THOS. R. BURCH, *Gen. Agent.*

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF WISCONSIN. } ss.

Thomas R. Burch, being first duly sworn, deposes and says that he is the general agent of the Phenix Insurance Company, one of the respondents in the above entitled cause. That he has read the foregoing answer, and that the facts therein contained are true, and

many of them within his own knowledge; but those not within his own knowledge he verily believes to be true.

THOS. R. BURCH.

Sworn and subscribed before me this 30th day of January, A. D. 1886.

[SEAL.] ALVA A. KNIGHT.

Witness, CHAS. E. VROMAN.

JOHN his × mark ATKINSON,
M. GAGNON,
JOSEPH LEISCH,
J. MCDONNELL,
FIRST PRESBYTERIAN SOCIETY OF GREEN BAY, BY CHAS. E. VROMAN, *Chairman Board of Trustees.*

ROBERT RAE,
Proctor for Respondents.

33 February 1, 1886. This day came the parties by their proctors, Messrs. Robert Rae and C. E. Vroman, appearing for the respondents, and Messrs. Jenkins, Fish and G. G. Greene for the petitioner, and the application of the petitioner that appraisers of the value of the steamer Oconto and her freight on the 20th day of September, 1880, be appointed, and also the motion of the respondents that the petition be dismissed for want of jurisdiction came on to be heard, and the hearing not being concluded, the same was adjourned until Tuesday, the ninth day of February, instant.

February 9, 1886. This day came the parties by their proctors, and the hearing of the application of the petitioner that appraisers of the value of the steamer Oconto and her freight on the 20th day of September, 1880, be appointed, and of the motion of the respondents that the petition be dismissed for want of jurisdiction, was resumed, and being further argued by Mr. Greene for the petitioner, and by Mr. Rae in opposition, the court took the same under consideration.

And now, at this same term, to wit: January term, 1886, and on the thirtieth day thereof, to wit: on the 9th day of March, A. D. 1886, the following proceedings were had, to wit:

In the matter of the petition of the Goodrich Transportation Company in a cause of limitation of liability of the owners of the steamer Oconto. } *In Admiralty.*

34 This day came the parties by their proctors, and on consideration of the motion of the respondent, The Phenix Insurance Company *et al.*, that this petition be dismissed for want of jurisdiction, it is ordered by the court that said motion be and hereby is overruled.

And afterwards, to wit: on the thirty-third day of said term, to wit: on the 15th day of March, A. D. 1886, the following proceedings were had, to wit:

In the matter of the petition of the Goodrich Transportation Company in a cause of limitation of liability of the owners of the steamer Oconto. } *In Admiralty.*

Now comes the petitioner by its counsel, and comes also Robert Rae and Charles E. Vroman of counsel for the several plaintiffs in the suits mentioned in the petition filed herein, and who appear in opposition to said petition, and it appearing to the court now here that due notice had been given to all parties in interest by publication as directed under the previous order of the court, and thereupon the said matter coming on to be heard upon the motion upon said petition, and this cause having been submitted to the court
35 upon said petition and the answers and objections of the said plaintiffs in said several suits in said petition mentioned, and upon the arguments of counsel, and the court being now well and sufficiently advised of and concerning the said motion, it is now here ordered and adjudged that the prayer of said petition be and the same is hereby granted, and the court now here orders and directs that J. V. Tuttle, George M. Tibbits and W. H. Wolf be and they are hereby appointed appraisers to appraise the value of the said steamer Oconto, her tackle, apparel and furniture, as it was on the 20th day of September, 1880, with the value of her freight earned on her said voyage from Chicago, Illinois, to Depere, Wisconsin, as mentioned in the petition filed in said cause and report the same to this court with all convenient speed, which said appraisement and valuation shall be made under oath and in accordance with the rules and practice of this court in admiralty.

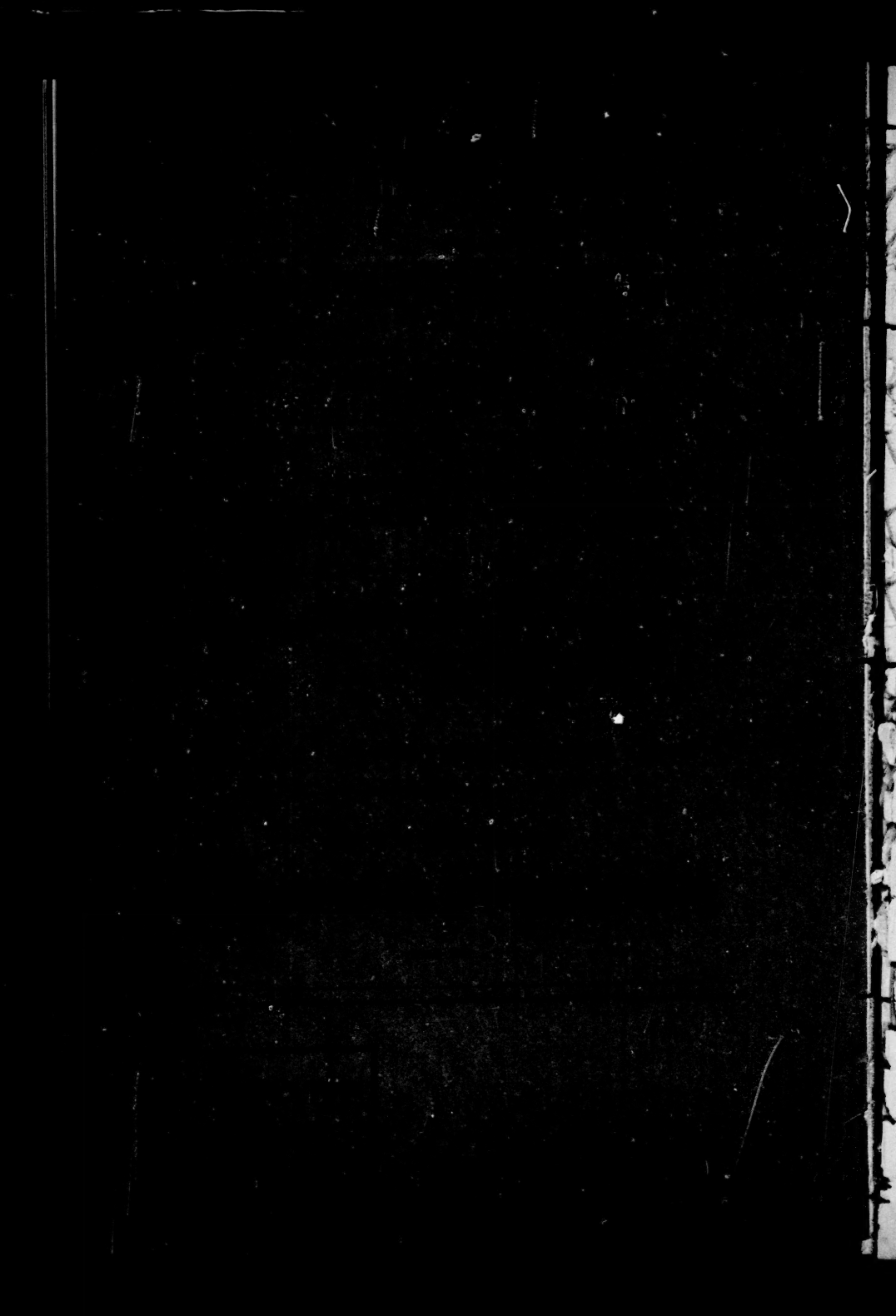
(Signed) CHAS. E. DYER, *Judge.*

36 UNITED STATES OF AMERICA, } ss.
EASTERN DISTRICT OF WISCONSIN. }

I, Edward Kurtz, clerk of the District court of the United States of America for the Eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with their originals now on file and remaining of record in my office, and that they are true copies of such originals, and correct transcripts therefrom, being a transcript of record in the matter of the petition of The Goodrich Transportation Company in a cause of limitation of liability of the owners of the steamer Oconto.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court at the city of Milwaukee, in said district, this 18th day of March, in the year of our Lord, one thousand eight hundred and eighty-six, and of the independence of the United States the 110th.

[SEAL.] EDWARD KURTZ, *Clerk.*



36 UNITED STATES OF AMERICA, } ss.
EASTERN DISTRICT OF WISCONSIN. }

I, Edward Kurtz, clerk of the District court of the United States of America for the Eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with their originals now on file and remaining of record in my office, and that they are true copies of such originals, and correct transcripts therefrom, being a transcript of record in the matter of the petition of The Goodrich Transportation Company in a cause of limitation of liability of the owners of the steamer Oconto.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court at the city of Milwaukee, in said district, this 18th day of March, in the year of our Lord, one thousand eight hundred and eighty-six, and of the independence of the United States the 110th.

[SEAL.] EDWARD KURTZ, *Clerk.*

118610

Office Supreme Court U. S.
FILED.
APR 5 1886
JAMES. H. McKENNEY.
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1885.

PHENIX INSURANCE COMPANY ET AL.

vs.

CHARLES E. DYER, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN.

IN RE PETITION OF GOODRICH TRANSPORTATION COMPANY TO LIMIT ITS LIABILITY UNDER ACT MARCH 3, 1851.

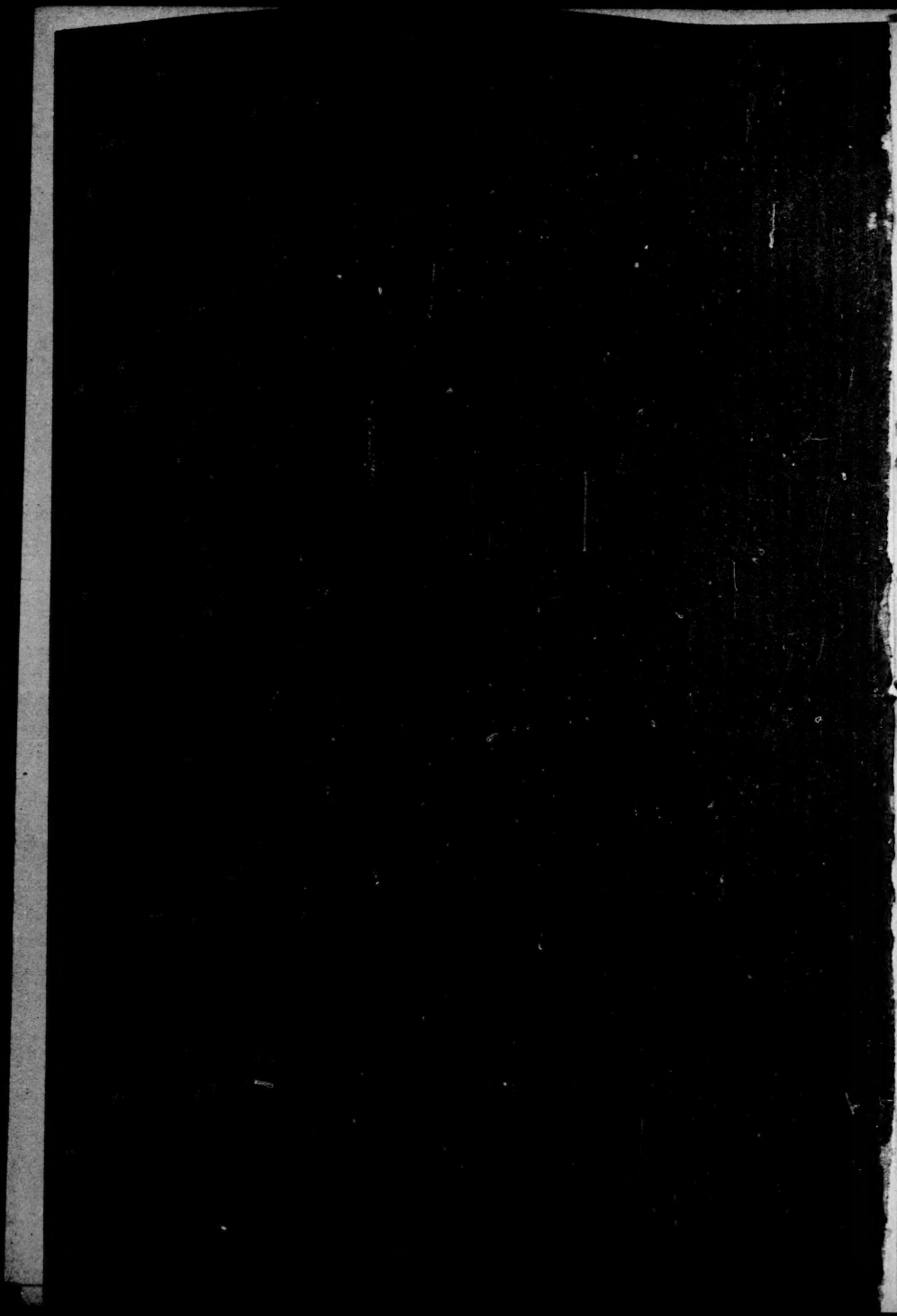
BRIEF OF PETITIONERS

FOR WRIT OF PROHIBITION.

ROBERT RAE,

PROCTOR FOR PETITIONERS.

BARNARD & GUNTHORP, LAW PRINTERS, 44 & 46 LASALLE ST., CHICAGO.



IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1885.

PHENIX INSURANCE COMPANY ET AL.

vs.

CHARLES E. DYER, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN.

IN RE PETITION OF GOODRICH TRANSPORTATION COMPANY TO LIMIT ITS LIABILITY UNDER ACT MARCH 3, 1851.

BRIEF FOR PETITIONERS.

The proceeding that is sought to be prohibited, is a proceeding by a vessel owner filed in the United States District court for the eastern district of Wisconsin, sitting in admirality on the instance side of the court for a limitation of liability under the act of congress known as the limited liability act, and in pursuance or by virtue of rules established by this honorable court under the act of March 3, 1851, embracing rules 54 to 58 inclusive.

The occasion of filing the petition by the Goodrich Transportation Company, was on account of a fire that

occurred on the 20th of September, 1880, at the city of Green Bay in the State of Wisconsin, which fire is said to have originated from the steamer Oconto, whereof it is the owner, and communicated to real estate situated in the city of Green Bay.

The damages claimed for which the company seeks to limit its liability, amount to about $28,000, and it is said the value of the vessel at the time with her freight then pending amounted to about $12,000.

The company offers to enter into a stipulation with sureties to be approved by the court, for the payment of the value of said steamer and the amount of her pending freight into the court, whenever it may be ordered so to do, and a monition is prayed for against all persons claiming any damage of any kind, for any loss, destruction, damage and injury occasioned by such fire, citing them to appear before the court and make due proof of their respective claims, and that the court designate some commissioner, before whom such claims shall be presented, in pursuance of such monition, and before whom the petitioner may appear and contest such claims, and its liability on account of any loss, etc., and if the company is not liable upon the coming in of the report of said commissioner and its confirmation by this court, it may be finally so decreed by the court; otherwise, the money so secured to be paid into this court by such stipulation, may be divided *pro rata* among the several claimants in proportion to the amount of their respective claims; and in the meantime, the respondents be restrained from further prosecuting their several suits, also all other persons about to commence suit, if any there be, be restrained.

Six suits were commenced in the fall of 1880 in the

Circuit court of Brown county at the city of Green Bay, by as many plaintiffs in an action of trespass on the case against the petitioner for the destruction of their dwelling houses and household property contained therein, to all of which said several suits, a general denial was filed. Verdicts from time to time were had by the plaintiffs and appeals taken to the Supreme court by petitioner, and one of these appeals is now pending.

Various dilatory motions were made by the petitioner, and changes of venue were had upon its application. That during the progress of these trials many thousand dollars of taxable costs were incurred and paid by the respondents.

After the date of the fire the owner of the steamer engaged her in many distinct and independent voyages, and until the close of that season of navigation, which occurred on the 20th of November thereafter, and it continued to employ said steamer for the years 1881 to 1885 inclusive. In the fall of 1883 it sold the steamer to parties living at Port Huron, and the vessel's home port was then changed to Detroit. That in the fall of 1884 the steamer herself became a wreck, stranded on Charity islands, near the mouth of Saginaw bay, in the State of Michigan and on Lake Huron, and the steamer is no longer *in esse*.

During all this time the petitioner has never sought to avail itself of the benefits of the act of Congress, 1851, and it is claimed in the answer that it thereby equitably abandoned its right so to do, but on the contrary conceded its liability for the damages incurred, if any, by reason of said loss; and it is insisted that it would be manifestly unjust after a delay of over five years to allow

petitioner, or to compel respondent to go back to said 20th of September, 1880, to ascertain and fix the then value of said steamer and her freight then pending.

That no part of the *res* is within the jurisdiction of this court. The case was set down for hearing upon the petition and answer.

I.

The petition is an original proceeding *in personam* in the United States District court on the instance side of the admiralty, and is not a proceeding *in rem* by a surrender of the property, and a petition that a trustee or trustees may be appointed for the benefit of such claimants as are entitled thereto, but is a proceeding simply to limit the liability of the petitioner by allowing it to give stipulation in the admiralty for the value of the offending thing, whereof it was at the time, the owner, obligating itself with sureties to pay into court whatever sum might be decreed against it by the court to the extent of such stipulation, which stipulation must in no case exceed the value of the vessel and her freight then pending; and is an attempt to remove a common law case from its appropriate jurisdiction into the admiralty which is without jurisdiction, thereby depriving the plaintiff of the right to a trial by jury.

II.

If the act of 1851 does embrace injuries to real estate on land, a question which we shall discuss under point VI., the district courts of the United States, neither under the statute nor by the rules in admiralty,

promulgated by the United States Supreme court in that proceeding, have jurisdiction to give the petitioner the relief which it seeks, the tort complained of not being a maritime tort, and as such, not within the admiralty and maritime jurisdiction.

That the case is not within the admiralty and maritime jurisdiction, is not now an open question. The Plymouth, 3 Wall., 20; the Prof. Morse, 23 F. R., 803; the Maud Webster, 8 Ben., 547; the Rock Island Bridge case, 6 Wall., 213; the Niel Cochran, 1 Brown Adm., 162; the Ottawa, *id.*, 356.

Congress could not, either under the admiralty and maritime grant of the constitution or the commercial grant, make torts maritime, which were not so by the general maritime law. It may be the lord of the sea, but the law alone is the lord of the land. So far as our own courts are concerned, when acting under the municipal law and not acting under the *jus gentium*, the law would be binding upon them, but it could not, under the admiralty and maritime grant change the law of the land as to things which were not maritime, and by so doing make them so. Under the commercial grant, Congress might change the commercial law when it affected commerce and navigation between foreign nations and the several states, but it was clearly not the intention of Congress, by the adoption of any of the provisions of this act, to make a purely common law tort a maritime one.

United States District courts, as such, when not proceeding in bankruptcy in civil cases, have no jurisdiction of suit at common law except in suits *in personam* in admiralty, where the jurisdiction is concurrent, except those brought by the United States, or by an officer thereof,

authorized by law to sue. (Rev. Stat., Sec. 563, Art. 4). And also in certain cases of debenture, injuries by conspirators in certain cases, etc.

In revenue, patent, copyright, bankruptcy, banking and admiralty causes, the original jurisdiction, irrespective of citizenship, is especially given by the constitution and by Congress. The United States District court is of limited, but not of inferior jurisdiction, and being so, proper averments must be made in the petition, bringing a case within its jurisdiction. Jurisdiction must be shown affirmatively. 8 Peters, 436; 19 How., 393, 566; 94 U. S., 455; 10 Wheat, 193; 1 Sawyer, 713.

The case of the "Thomas Hood," cited *post*, is the only case in which it was attempted by a proceeding similar to that of the case at bar to apply the act of 1851 to an injury or tort committed on land by the agents or servants of a vessel owner, by or through the agency of a water craft.

The question was not raised, however, whether the court had such jurisdiction to administer such a remedy, if any existed, and while the books are full of cases of parties seeking the benefit of the act in an admiralty court, they are all cases of maritime tort of which the court had original jurisdiction, and in most cases where the suit was pending in such court. This is the first time such a question has arisen, and is, therefore, one of first impression.

The act of 1851 is not a judiciary act, conferring jurisdiction on either the District or Circuit courts. It leaves the owner of the vessel, seeking the benefits of its provisions perfectly free to choose what court he pleases, provided the court is one of competent jurisdiction. If it is exclusively a common law case, he must seek a common

law court, or if, by reason of some defect therein to administer the remedy, a court sitting in equity. The statutes of the United States are as much the law of the land as those of the several states, and may be enforced in the state courts as well as in the federal, except in such cases where exclusive jurisdiction is given to the latter courts. (*Clafner* v. *Houseman*, 93 U. S., 130.) Under this statute, he may take affirmative action by divesting himself of his title, and transferring it to trustees for the benefit of the freighters who have suffered an injury during the voyage, if the value of his vessel and freight then pending is less than his claim. If, on the contrary, the case is one of admiralty jurisdiction, he may go into the admiralty court and file his petition before or after suit brought, and if his property is seized, he may give a stipulation for value, or he may transfer the property to a trustee, and pay over to him the freight then pending; or he may set up the limitation of liability in his answer. The admiralty having jurisdiction of the principal thing, to wit: the tort or injury mentioned in the several articles of the act whenever the same are enumerated, and in the omnibus clause of any loss, damage, injury or forfeiture of a similar kind as those enumerated in the act, all of which are within the admiralty jurisdiction, has also jurisdiction of its incidents, and it is an inherent power of the admiralty to take a stipulation for value independent of the act in a proceeding in *rem* when the *res* is within the jurisdiction of the court. This is so also in England by an enabling statute when the case is at common law, if the ship and proceeds are in the admiralty, but if otherwise, it is not so; chancery must hear the case. L. R., 7 Exch., 187; *id.* on Appeal, *id.*, 287. Parliament being omnipotent may confer common law power on an admi-

ralty court in England, but beneath the constitution of the United States, Congress has no such power.

In the case of *ex parte* Gordon, 104 U. S., 516, a writ of prohibition was prayed for, and the question presented was, whether the vessel was liable to the libelants for pecuniary damages resulting from the loss of life in a collision with another vessel. Here was a case where the party claimed an exemption from all liability. In the case at bar the parties claimed an exemption *pro tanto*. The court deny the writ of prohibition upon the ground, "that "the collision which caused the injury was certainly a "subject of admiralty jurisdiction. It occurred between "two vessels while navigating the public waters of the "United States, and was a maritime tort. For damages "to the vessel and her cargo caused by the collision, a "suit could have unquestionably been obtained in the Dis- "trict court of any district where the vessel should be found. "The question in the present suit is whether the vessel "is liable to the libelants for pecuniary damages, etc., "having jurisdiction in respect to the collision. It would "seem necessarily to follow, that the court had jurisdic- "tion to hear and decide what liability the vessel had in- "curred thereby. The court of admiralty having juris- "diction of the vessel and the subject matter of the action, "to wit: the collision, it is competent to try the facts, "etc." But how different is the case at bar. Here the court having *no* jurisdiction in respect to the *fire*, "it "would seem necessarily to follow that the court has no "jurisdiction to hear and decide what liability the vessel "had incurred thereby," whether limited or otherwise. If the former is good law, the latter must be.

III.

The fact that the act of 1851 constitutionally may be supported under the commercial grant, as a regulation of commerce, cannot confer jurisdiction upon an admiralty court of the United States. The jurisdiction of the courts of the United States cannot be made to depend on regulations of commerce. They are entirely distinct things, having no necessary connection with one another, and are conferred in the constitution by separate and distinct grants. The extent of the judicial power is carefully defined and limited, and Congress cannot enlarge it to suit even the wants of commerce, nor for the more convenient execution of its commercial regulations. And the limits fixed by the constitution to the judicial authority of the courts of the United States will form an insuperable objection to this law, if its validity depended upon the commercial power.

This power is as extensive upon land as upon water. The constitution makes no distinction in that respect. And if the admiralty jurisdiction, in matters of contract and tort, which the courts of the United States may lawfully exercise on the high seas, and on the lakes and navigable waters of the United States, be extended to contracts and torts on land when the commerce is between different states, it can, with the same propriety and the same construction, be extended to collisions and torts on land; and it may embrace also the vehicles and persons engaged in carrying it on.

It would then be in the power of Congress to confer admiralty jurisdiction upon its courts over the cars engaged

in transporting passengers or merchandise from one state to another, and over the persons engaged in conducting them, and deny to the parties the trial by jury. Now the judicial power in cases of admiralty and maritime jurisdiction has never been supposed to extend to contracts made on land, and to be executed on land, or to torts committed on land. But if the power of regulating commerce can be made the foundation of jurisdiction in its courts, and a new and extended admiralty jurisdiction beyond its heretofore known and admitted limits, may be created on water under that authority, the same reason would justify the same exercise of power on land.

If the case is within the admiralty jurisdiction, then the citizenship of the parties is indifferent, because the jurisdiction depends upon the place and not upon the residence of the parties. If the act of Congress intends to confer jurisdiction upon the courts of the United States upon the power to regulate commerce, it would be unconstitutional and could confer no authority on the district courts.

The prohibition of the constitution, by that clause of the constitution which gives to the federal courts jurisdiction of civil causes of common law jurisdiction and power to try controversies existing between citizens of different states, forbids that Congress in a regulation of commerce should by implication confer upon the district courts any such jurisdiction. (The Genesee Chief, 12, How. 443.)

The commercial grant to regulate commerce is not *per se*, a plenary power, but only a power *sub modo*. It gives to Congress the power to regulate commerce with foreign nations, among the several states, and with the Indian tribes.

Now the limiting of the liability of a ship-owner for the torts of his servants committed on land and having no necessary connection with trade or commerce, inflicting no injury upon goods, wares or merchandise shipped or put aboard any ship or vessel, or in collisions between two water craft, but an injury to real estate and the household furniture contained therein, is not a regulation of commerce with foreign nations, among the several states, or with the Indian tribes.

This court seems to support the jurisdiction of the Admiralty courts in taking cognizance of the proceedings only in cases of admiralty jurisdiction.

The case of the *Norwich Co.* v. *Wright*, 13 Wal., 104, was a case of collision within the admiralty and maritime jurisdiction of the court, and the application was made to limit the liability in the eastern district of New York, the libel for the tort having been instituted in the District court for the district of Connecticut. Neither the vessel itself nor the fund representing the value was paid into the District court of New York. The court therefore held that the District court for the eastern district of New York was without jurisdiction. The court, however, after stating that the act does not state what court should be resorted to nor what proceedings should be taken, holds that the parties, or any of them, may take "the "appropriate proceedings in any court for the purpose of "appropriating the sum for which," etc. This "which," etc., mean under section 4, where it occurs, the sum for which the freighters on the same voyage, and the owner or owners of the ship may be liable. This is a clear case of admiralty jurisdiction, and the language of the Supreme court which follows at page 123, after quoting

the language of this section should be construed as having reference thereto, and it was well said by the court when it said: "Now, no court is better adapted than a court "of admiralty to administer precisely such relief. * * * "Congress might have invested the Circuit courts of the "United States with the jurisdiction of such cases by a "bill in equity, but it did not. It is also evident that the "state courts have not the requisite jurisdiction." (113 Mass., 502.) Why the state courts would not have the requisite jurisdiction in cases in equity it is difficult to perceive, unless on the ground that the proceeding being one *in rem*, and, as such, of exclusive admiralty jurisdiction, the court could not have the requisite jurisdiction.

In the case of *Providence & N. Y. Steamship Co.*, 109 U. S., 593, the court, after saying that the rules or process authorized under the act of 1842 authorized the Supreme court to regulate the form of framing and filing libels, bills, answers and other proceedings and pleadings in suits at law, in admiralty or in equity, declares as follows: "We are clearly of opinion that the authority "thus vested in this court was adequate and sufficient "to enable it to make the rules before referred to. The "subject is one of pre-eminently admiralty jurisdiction."

In this case, as in the other, it was clearly a case of admiralty jurisdiction, a libel filed for a breach of contract of affreightment, the destruction by fire of goods taken in and put aboard of a ship. This was a case within the maritime jurisdiction, and the statute was simply offered as a partial defense. In the case at bar, however, there is a broad, sharp distinction, clear and unmistakable, which at once attracts the judicial mind, which is, that the case at bar is not one of admiralty nor

of equity jurisdiction, but of pure common law cognizance, and as such, not within either of the other jurisdictions. Nor is it an answer to say that a right derived under an act of Congress may be sued in the United States courts. A patent or a copyright, or a bankruptcy case, are all rights existing by virtue of the constitution and laws of the United States, and as such, a remedy may be sought in the courts of the United States, but unless Congress confers the jurisdiction on the District court of the United States, it is without it, but if Congress did authorize a patent cause to be brought in the admiralty, the admiralty could have no pretense of jurisdiction, for Congress would have no authority to make any such designation. It may be, that in a case of concurrent jurisdiction at common law and in admiralty, such as in a suit *in personam* on a contract of affreightment or mariner's wages, or of tort where the suits may be prosecuted in the common law courts or in the admiralty, that the petitioner may go into the admiralty, and, upon complying with the act, plead the decree as a defense in bar to the action of the common law, but surely not in a case where the admiralty courts had no jurisdiction whatever. In the Alpena case, 8 F. R., 280, it was held, that after a libel was filed, the petition should be filed in the court where such libel is pending; and so with the present rules; and the Supreme court of the United States altered these rules so that if the case is pending in the Circuit court, it, and not the District court, shall take jurisdiction. The Benefactor, 105 U. S., 245. So *Peck* v. *Jennis*, 7 How., 624, is on all fours with the case at bar; it was, however, a case of bankruptcy, and the District court, as in admiralty, had exclusive jurisdiction of all suits and proceedings in bankruptcy; but the case

pending in the State court, and which it was sought in the District court, sitting in bankruptcy, to enjoin, was not a cause of bankruptcy. The Supreme court held that the state courts, whenever it was a proceeding at common law in a suit at law, was as competent to determine the question as the Bankrupt court, and no injunction could issue.

It is also a familiar principle of law that the courts which first gets jurisdiction in case of concurrent jurisdiction retain the case for every purpose. 112 U. S., 294; 24 How., 450; 20 *id.*, 483; 7 *id.*, 612; 9 Wheat., 432; 1 Biss., 1. The case of *Taylor* v. *Carroll*, 20 How., 583, was a case where there was a conflict between the admiralty courts and the courts of common law.

IV.

If Congress could not enlarge the jurisdiction of the United States District courts sitting in admiralty, then the act of 1842, which conferred upon the Supreme court of the United States jurisdiction to prescribe modes and forms of procedure in equity and admiralty cases only, could not authorize the Supreme court of the United States by rules of practice to enlarge the admiralty jurisdiction. *The Steamer St. Lawrence*, 1 Black 522. The process act of 1792 and 1829 is also confined to admiralty and equity process.

There is no act of Congress authorizing the Supreme court of the United States to make rules and regulations in common law cases, but on the contrary, Congress has prescribed that the practice in the several circuits must

be the same as in the several states in which they are held, any rule of the court to the contrary notwithstanding. Act of 1792, section 914.

The act of 1851, in cases of certain loss and damage specified only authorizes the proceedings to limit the liability, and in a particular way, to wit: by transferring the property to a trustee in a court of competent jurisdiction, without naming any particular courts.

If a court of admiralty is not in a given case a competent court of jurisdiction for the reason the subject matter is not maritime, then it is not such a court for such proceeding; nor can the rules and regulations of the Supreme court make it such a court. The Supreme court has no power to bestow jurisdiction upon a court that does not have it *proprio vigore* under the constitution and laws passed in pursuance thereof. Congress might bestow upon the United States District court power to enforce rights existing at common law between citizens of different states, and if Congress has the power so to do, it has not exercised it by the act of 1851.

Congress has the power, under the commercial grant—which is not coterminous with the admiralty grant, although the latter embraces much the largest ground covered by the former—to regulate bills of sale, express hypothecation, either by way of mortgage or otherwise of vessels of the United States; yet no one would suppose that Congress could confer upon the United States Circuit or District courts jurisdiction as between citizens of the same state to take cognizance of a mortgage proceeding upon such a ship or vessel.

Congress has provided that the District courts of the

United States, except in cases of bankruptcy, shall not have the power to issue injunctions, to stay any proceedings in a state court. Rev. Stat., 720; *Peck* v. *Genes*, 7 How., 625: *Taylor* v. *Carryl*, 20 How., 583; *Watson* v. *Jones*, 13 Wall., 679; *Haines* v. *Carpenter*, 91 U. S., 254; *Dial* v. *Reynolds*, 96 U. S., 340. These statutes were revised in 1872, and the addenda, except in bankruptcy cases, was made, notwithstanding the act of 1851. The doctrine of *expressio unius est exclusio alterius* applies. This addenda, no doubt, following after the case of *Norwich* v. *Wright* was decided, which was in 1871, had reference thereto. See Revised Statutes, section 1,285.

The act of 1851 does not provide for issuing injunctions, but merely provides that after complying with the act all proceedings shall cease.

This mandate is obligatory upon the state courts as well as upon the United States courts, but if the former disregard it, what court has authority to enjoin the state courts? Certainly not the District court. The act of 1793, re-enacted in 1872 with the addenda, can only be repealed by implication, and the Federal courts will not imply that the State courts, supreme and of general jurisdiction, are to be controlled by the United States District courts in cases of concurrent jurisdiction, where the State courts have first acquired jurisdiction, unless the power is clearly given by Congress, exercising legitimate authority under the constitution. Indeed, we find under act of 1881 the Supreme court declining to issue an injunction to a state court on the ground of a doubtful power to do so. *The Mamie*, 110 U. S., 742.

The act of Congress does not authorize any court having jurisdiction of the proceedings to issue injunction.

The process of injunction is unknown to the admiralty, and while the books are full of prohibitions, being issued by the common law courts to the admiralty, it would be a novelty to find an admiralty court which is not a court of record, but a court of limited jurisdiction, though exclusive in that jurisdiction, enjoining a court of record. Courts of admiralty, as such, have no such power, and while Congress might declare them courts of record, and bestow upon them such extraordinary power in a proper case, it has never done so.

In the case at bar the vessel is not within the jurisdiction of the court, and in a case of common law jurisdiction, the act of Congress has not provided any stipulation, but provides that the boat itself shall be conveyed to trustees, and it is in cases where this is complied with that all proceedings shall cease. It is doubtful whether any one of the sections of the act of 1851 authorizes a cession of the property to a trustee for the benefit of a common law claimant, who is such by reason of a tort on land. *The Alpena*, 8 F. R., 281; *id.*, 105 U. S., 452; *The Benefactor*, 103 U. S., 245. In all cases where a stipulation for value has been taken, it is in a maritime cause within the admiralty jurisdiction, and authorized by the admiralty rules and practice.

V.

The admiralty rules themselves, in cases of proceedings to limit liability, are confined to and contemplate a case of admiralty jurisdiction. The same rules of construction applicable to the interpretation of statutes may be properly applied to these rules. Rule 54

speaks of a case where any ship should be libeled, or the owner or owners thereof shall be sued. The words "owner shall be sued," are used in contradistinction to the words, "vessel shall be libeled," and evidently refer to "a suit *in personam*," and is justified by the frequent use of the word in that relation, as in a case where the vessel is libeled *in rem*, or the owner sued *in personam*. Rule 2 provides that all suits *in personam*, the mesne process, etc.; rule 3, in all suits *in personam*, where a simple warrant, etc.; rule 4, in all suits *in personam*, where goods and chattels, etc.; rule 6, in all suits *in personam*, where bail is taken, etc.; rule 7, in all suits *in personam*, no warrant of arrest, etc.; rule 8, in all suits *in rem* against a ship, etc., and so on throughout all the rules, the action *in rem* or *in personam* is called a suit, and the nomenclature of "suit" is more frequently used in equity and admiralty causes than at common law: the latter are known by the name of actions. Rule 54 is pretty much in the language of the statute itself, as to the enumerated causes for which the owner may claim the benefit of the act, but for the first time special legislation appears in the rule, and then only *ad hoc*—in cases of vessels libeled or owner sued, the owner may file a petition in the proper District court, which, by rule 57, is the one in which the vessel libeled or the owner sued, and upon a proper case shown, an appraisement may be ordered, and a bond given for the value, or the owner may elect or transfer his interest in the vessel and the freight then pending to the trustee. In compliance with such order, the court shall issue a monition against all persons claiming damages for any such embezzlement, loss, destruction, damage or injury, citing them to appear before said court and make due proof of their respective claims. Rule 55 prescribes that such

claims shall be presented before a commissioner to be designated by the court with a right to contest *inter sese*, and upon the coming in of the master's report, the court shall distribute, etc. Rule 56 confers the right to hear and determine the causes pending, and the owner of the vessel may test his liability for the injury complained of, and the claimants may contest the right of the owner to an exemption from liability or a limitation under the act of Congress.

These rules create a forum, before which the corpus of the litigation is to be heard and determined. The right of trial, if not denied, is not provided for; a commissioner is to hear and report. Under the act of 1845 the right of trial to suitors is preserved, but under the decisions of the admiralty courts the verdict of the jury is but advisory, and performs the same office that a feigned issue out of chancery; the judge, or commissioner, is not bound by it. Thus, we find a case, confessedly of common law jurisdiction, and of which the admiralty is without jurisdiction, drawn by a rule of court, from the courts of law to a court of admiralty, and that which a court of admiralty could not hear in the first instance by a direct process, at the request of the plaintiff, it may indirectly acquire jurisdiction, to the exclusion of all others, at the will of the defendant. It is plain, if the admiralty has jurisdiction of the principal thing, it may take jurisdiction of the incident. If it has jurisdiction of the *res*, as proceeds in the registry of the court, it may take jurisdiction to distribute them among common law claimants who have a lien on them, but not otherwise; even in a case of the material man, who has furnished supplies to a vessel, which will give him an admiralty lien, and who takes the promissory note of the

owner, could not retain the promissory note and sue on it in admiralty *in personam*, because the consideration of the note grew out of a maritime contract. The case at bar is not a mixed one. Some claimants with admiralty claims, and some with common law claims, but they are all of common law claims. What then is the principal thing? The subject matter which gives the right of action, or the quantum of damages that may be recovered? Is it the tort committed which is to be heard and determined in the suit, the merits of the controversy, or to the extent, which, when determined, the rule of *restitutio in integrum* shall apply; if the quantum of damages is but the incident, and the cause of action the principal, and not the incident, then the admiralty has not jurisdiction of the principal, and, as a consequence, cannot take jurisdiction of the incident. The statutes which these rules enforce may have a fair construction in the interest of trade and commerce, but they are also to have a fair construction in the interest of the public at large. It is made for the interest of those who are engaged in commerce, and ought to alone affect them. It was never the intention of the courts to say that Congress intended to purchase at the cost of the community something for the benefit of shipowners of persons no way interested in trade or commerce, or their property. It hints at taking private property for public use, without just compensation and without the intervention of a jury, and such a purpose cannot be imputed to Congress.

It cannot for a moment be supposed that Congress intended to extend the benefits of this act to the owner of a vessel who is a wrong-doer by reason of the acts of his agents embezzling or appropriating any and all property left in his charge as bailee or trustee, or by acts of tres-

pass either by way of nonfeasance or malfeasance; it is better to confine it to cases only of such goods as are shipped or put aboard his vessel, or by a loss from collision by such vessels as he may own, or for any act, matter or thing, damage or forfeiture occasioned or incurred by his servants, having reference to trade and commerce, and employed on such vessel as he may own, that he may be permitted to have the benefit of these rules and regulations of the Supreme court.

VI.

That the act does not embrace injuries to real estate and the property therein contained, or torts done on land to property or things not engaged in trade and traffic, and commerce between foreign nations or among the several states, or with the Indian tribes, but only injuries occurring through the default or treachery of the master or mariners without the privity or knowledge of the owner of the offending vessel, to property which is the subject of commerce and trade in transit on the high seas, the great lakes and the navigable waters of the United States, or to property afloat.

The act is to be construed *inter se et ad homines*, and is to be confined to ship owners, foreign and domestic freighters, passengers and maritime merchants, whose property at risk might stand a chance of being of about equal values, and the liabilities, liens and remedies of equal right. The act is one of enumeration of the parties and things which are to be affected by it; and the parties and things enumerated are limited to persons and things maritime. The first section exempts ship owners from loss

or damage by fire to goods on board the ship; the second exempts the master or owner from loss or damage to jewelry, precious metals or money put on board the ship; the third section, to any embezzlement, loss or destruction by the officers, crew or passengers or any other person, of any property shipped or put aboard said vessel, or for any loss, damage, or injury by collision, or for any act, matter or thing, loss, damage or forfeiture done or incurred.

The Supreme court has settled in *Norwich Co.* v. *Wright*, 13 Wall., 120, that the words "any loss" apply to any loss by collision, and are to be read in connection with it, and not in connection with the succeeding provision, to wit: "Or any act, matter or thing," etc. The latter phrase has received a judicial interpretation as to fire on shipboard in the case of the *Providence & N. Y. S. S. Company*, *post*.

In the construction of statutes, general words are restricted in their meaning by the subject matter of the statute, the context and apparent intent; and in enumeration of particulars followed by general terms, a restriction of the latter to cases or things *ejusdem generis* is according to settled rule. *Ex. Gr.*, in a marine policy of insurance after the enumeration of particular marine perils inserted follows an omnibus clause "and of all perils, "losses and misfortunes," etc.

These words, it has been observed, must be considered as introduced in the policy in furtherance of the objects of marine insurance, and may have the effect of extending a reasonable indemnity to many cases not distinctly covered by the special words; they are entitled to be considered as material and operative words, and to have the due

effect assigned to them in the construction of this instrument; and this will be done by allowing them to comprehend and cover other cases of *marine* damage of the like kind with those which are specially enumerated, and occasioned by similar causes; that is to say, the meaning of the general words may be ascertained by referring to the preceding special words. Broom's Legal Maxims, pp. 567, 570.

This is the first illustration given by Broom under the legal maxim *noscitur a sociis*. In looking at all of the provisions of the statute of 1851, we find there is a proviso, that nothing in the act contained shall apply to any boat, barge, lighter or vessel whatsoever, etc., used in rivers or inland navigation. Under this proviso it has been held, that a steamboat engaged on the Mississippi river is not within the provision of the act. There is also a provision that nothing in the act contained shall prevent parties from making such contracts as they please extending the liability of ship owners. Most of the matters and things enumerated in the various sections of the act have sole reference to the relations of ship owners as common carriers. By excluding river and inland navigation from the benefits of the act, Congress clearly indicated its intention to clearly draw a distinction between things that were maritime, and things that were not maritime, things occurring on the high seas, and things occurring on inland waters. The original acts of the Georges, of 1734 and 1786, and the act of the State of Massachusetts of 1818, and of Maine of 1821, confined the injury or wrong committed on shipboard of the offending vessel. It was not until the statute of 53d George III., in 1813, in consequence of the decision of *Sutton* v. *Mitchell*, 1 Term Rep., 20, in which it was said

by Judge BULLER "that freighters and owners of prop-"erty on board the vessel, and no one else, were affected "by the act"—that it was provided, that in cases of collision, injuries done to other vessels and cargo should be within its provisions.

The English acts were taken from those of Holland; and those of Massachusetts, Maine and the United States from England. In the several French ordinances a distinction was always made between those cases which were maritime and those which were not. In the former the ordinance applied, in the latter the wrong done was put on the same footing of all other wrongs, and the wrong-doer was compelled to make full satisfaction; Marsden on Collisions at Sea, page 77, note; and so in the English courts; *Gale* v. *Laurie*, 5 B. & C., 156; The Northumberland, L. R., 3 A. & E, 613; 4 P. D., 157; 3 *id.*, 182, 190.

The act enumerates no loss or damage, act, or thing done, which is not one of admiralty jurisdiction according to the maritime law of the United States, nor makes any provision for a distribution of the proceeds of the value of the vessel and the freight then pending by means of a transfer of the property, or otherwise, other than among freighters, etc., who have a cause of action, civil and maritime, and if the action is to be extended to torts on land, it must be done by judicial legislation, as Congress has made no such enactment. It would be unfair to impute to Congress, in making a provision for the partial satisfaction of the injured party from a thing done on the sea, an intention to embrace in the same act injuries on land, and then neglect the interest of those on land who had nothing to gain from the act, and in no

way interested in trade or commerce, such as a landlord and tenant whose dwelling and household goods were destroyed by a marauding merchant of the seas. Silence as to this latter class by Congress proves that their rights and remedies were not intended to be injuriously affected by it. Congress must have been more or less informed of the provisions of the commercial code of other countries treating on this subject, and *in pari materia*, and, as we have seen by these codes, injuries that were not maratime were not embraced within them.

No case can be found except that of the "Thomas Hood" decided in the Northern district of Illinois, in which it was attempted, by a proceeding similar to that of the case at bar, to apply the act of 1851 when the injury or tort was committed on land, viz: by a collision of the vessel with the abutment of a bridge standing in the channel of the river in the city of Chicago.

The court, without the benefit of argument, and without the question of jurisdiction being raised, in a short decision ruled that the act applied. The case was decided by Judge Blodgett in January, 1885, and is unreported.

The reasons assigned in the case of the tug "Thomas Hood" by the court in deciding the case, with all due respect to the ability of the judge who decided it, we think are far from being satisfactory. Congress in withdrawing river or inland navigation from the benefits of the act, had clearly indicated that for the injuries which a vessel might inflict along the shores of rivers, for those torts committed on the property on land of strangers in no privity with trade and navigation, the ship-owner should make full satisfaction in common with all other tort

feasors. To otherwise interpret it the compensating law of reciprocity would be so violated and disregarded as to shock every sense of justice and equity. If such property on land should inflict a corresponding injury upon a vessel, the owner of such property could not have the benefit of any such act.

It was not the intention of Congress to relieve the ship-owner from *all* liability for the act of his servants, when such servants were mariners, or for injuries committed by them everywhere, on sea and on land. It was a sufficient encouragement to ship-owners to limit their liability for the torts of their agents when those agents were beyond their control and on the high seas. It was an act dealing with trade and commerce, and with injuries and damage inflicted by or with persons engaged in this pursuit. It was an act having no reference to injury to real estate, or to things done on land. It might be, as was said by Judge Blodgett, important to the ship-owner, that he should be relieved everywhere, both on land and sea, for the negligence and treachery of his mariners, but Congress would never create a privileged class consisting of foreign and domestic vessel owners, whose servants might commit trespasses on land, and limit the liability of such a class, and refuse it to all other classes.

It is a canon of judicial construction of a statute, that where a common law right is sought to be invaded by force of a statute, the language should be clear and unambiguous, and the intention of the legislature free from all reasonable doubt. Hence, it has been held, that where a liability at common law was sought to be invaded by act of parliament, to be effective, the statute must be explicit and expressed in apt terms. 1 G. & D., 547; 2

Appeals (Moak), 743. *Shaw* v. *R. R. Co.* 101 U. S., 557.

It has been held in England, under the liability act of ship-owners, that it does not extend to any injury done to a pier or dock; 10 and 11 Vic., 27 S., 74; *River Ware Commrs.* v. *Adamson*, 1 G. & D., 547; 1 Q. B. D., 547; 2 Appeals (Moak), 743.

In France the article 350 of the code de commerce places fire, which is not a peril of the sea, as a peril of the sea if it occur upon the sea. Both Loere and Pardessus tell us in commenting upon this article, that according to a general understanding, the code places fire among the number of risks, but that "this article means only such "fire as happens by accidents from the sea." Note 2 to Pouget, Vol. 1, page 97. So it may be said in reference to the word "loss" when occurring in the act of 1851, that it means a loss occurring upon the sea or navigable waters of the sea, or in other words, a maritime loss.

The first section of the act of 1851 supports and gives countenance to this construction; this section exempts ship-owners from liability for losses on board of their ship by fire "unless such fire is caused by the design or neg-"lect of such owner or owners," and the last section declares that the act shall not apply to any vessel of any description whatever used in rivers or inland navigation. Therefore, the provisions of the act must apply only to foreign and American vessels not used in river or inland navigation, and to their owners, and the language of the third section, after providing for any loss by collision provides "for any act, matter or thing, loss, damage or for-"feiture occasioned or incurred without the privity or "knowledge of such owner or owners, shall in no case

"exceed the amount or value of the interest of such "owner," etc. It might be supposed that the first section covered the whole ground so far as liability for losses by fire is concerned, but the Supreme court of the United States has decided otherwise in the Providence and New York Steamship Company, 109 U. S., 602. The court held there was no inconsistency or repugnancy in allowing a partial exemption in cases falling within the third section, that is, cases of loss by fire, happening without the privity or knowledge of the owners; they may not be able under the first section to show that it happened without any neglect on their part, while they may be very confident of showing under the third section that it happened without their privity or knowledge. To this, Mr. Justice Field, in a dissenting opinion, in which Mr. Justice Gray concurs, replied, to so much of the opinion of the court that proceeds on the assumption that cases of loss and damage by fire, are within the provisions of the third section of the act that such an "assumption necessarily involves the conclusion that a "fire, caused by the design or neglect of the owner, may "occur without his privity or knowledge, which appears "to be nothing less than saying that contradictory and in-"consistent terms may be appropriately applied to the "same transaction. * * * It seems clear that the "various cases of damages and losses enumerated in sec-"tion 3 are not intended to embrace losses by fire. This "section first speaks of the liability of the owner for em-"bezzlement, loss or destruction, by the master, officers, "mariners, passengers or other persons, of property shipped "on board the vessel. It then speaks of his liability for any "loss, damage or injury by collision; and, lastly, for any "loss by any act, matter or thing, loss, damage or forfeit-

"ure, done, occasioned or incurred without his privity or "knowledge. It is conceded that the language of the first "and second parts of the section does not include losses by "fire, and the language of the concluding clause does not "necessarily include them. It may be applied to other "cases; and as losses by fire are specifically embraced by "the first section, it must receive such application as will "give to each section full force. This is a settled rule of "construction. Besides, it cannot be contended that an act "done by the design of the owner could have been done "without his privity or knowledge. It must necessarily "have been done with both; and if the fire was caused by "the neglect of the owner it must be presumed to have "been caused with his knowledge. Where one is bound "to do a thing or to see that certain things are done, he is "presumed to know the direct consequence of his careless-"ness and neglect in those respects. Especially is this so "where his doing the thing or seeing that it is done is "necessary to the safety of life or property. He cannot "shield himself from responsibility by saying that he did "not know what would be the consequence of his careless-"ness and neglect. The law presumes that he does know "it and intends it. The act speaks of neglect by the owner, "not by any subordinate officer or agent. It is therefore "personal neglect which is meant, and it would be unrea-"sonable to hold that the owner was ignorant of that "which necessarily followed from his own personal con-"duct.

"Not only would this be unreasonable, but there is an "inconsistency in holding that the first section exempts "the owner from all liability in cases of fire happening "without his design or neglect, if by the third section a "liability is fastened upon him to the extent of the value

"of the ship and freight, in case of a fire occurring with-
"out his privity or knowledge. And yet, according to
"the position of the court, the owner is exempted by the
"first section from all liability if a fire occur without his
"knowledge and privity, and by the third section is sub-
"jected to liability to the extent of the value of the ship.

"As stated by counsel in the court below, there can be
"no public policy in absolving common carriers by water
"from their full liability to others for property which
"has been entrusted to their care, and has been lost by
"their design or neglect. It certainly would require lan-
"guage, as he observes, so clear and plain that no subtlety
"of criticism can escape from the conclusion before
"such a purpose can be ascribed to Congress. It would
"be establishing a limitation of liability against public
"policy, common right and the universal feeling of jus-
"tice. It would make the law one to protect wrong-
"doers, and to punish the innocent who had been injured
"by them while thus protected.

"If, then, the first section is not affected by the other
"sections of the act, the liability of the owner of a vessel
"in case of fire caused by his design or neglect exists, as
"it always has existed at the common law; and that lia-
"bility may be enforced in any court, state or federal,
"having jurisdiction of the parties. The other provisions
"by which the owner may seek to relieve himself from
"liability by surrendering his vessel and the freight
"earned, have no application to such a case. It follows
"that the defense of a liability limited, as asserted by the
"District court, goes to the ground." (At pp. 603, 604,
"605.)

The first section of the act, Sec. 4282 of Rev. Stat.,

confines the loss not only to goods shipped on board, and by reason or by means of the fire which happened, but "to the ship," or "on board of her,"—by this is meant a fire which happens to the ship physically, and does not apply to a fire where the ship herself is not touched by the fire at all. The statute means that the fire which happens to or aboard the ship must be the cause of the loss.

By judicial construction, the third section is extended to losses by fire happening without the privity or knowledge of the owners, but it certainly never was intended to extend the statute so as to embrace any other loss by fire, except by means of fire happening to or on board said ship.

In cases where there is no limitation of liability for fire under the contract, and the limitation is purely by virtue of a statute, and where that statute is in derogation of common law, the *onus* is upon the party for whose benefit the statute is made to bring himself within the provisions of it.

U. S. v. *Scudder*, 22 Wal., 251.

The United States Supreme Court in the case of the Providence and New York Steamship Company *in arguendo* says that the provisions of the act of 1851 are nothing more than the old maritime rule administered in courts of admiralty in all countries except England. As to such a rule belonging to the old maritime law, by the civil law, the liability of owners was co-extensive with the damage or loss (3 Kent's Com., 165, note); nor is there any trace in the maritime codes of the middle ages of any such limitation. (Twiss Black Book of the Adm. I. 37, 108; II. 229, 449; III. 283, 285, 291; IV. 273, 284, 373, 435.)

According to the English judges and writers (the Dundee, Hagg. Adm., 120), Holland was the first to lead off, then England, and then the United States. By referring to the debates of Congress, in 23 Congressional Globe, pp. 713, 720, it will be seen that it was the intention of Congress to put American shipping on the same footing with England. Mr. Harlan, chairman of Senate Committee on Commerce, says: "Why not give to those "who navigate the ocean as many inducements to do so "as England has done? * * * This is what the bill "seeks to do, and it seeks no more." Of the third and fourth sections he said: "These two sections are sub-"stantially the English law." Mr. Davis, of Massachu-"setts, said: "It is simply placing our mercantile marine "upon the same footing as Great Britain." Mr. Rantoul from the same state, asserted of the law of Great Britain: "They have made the alteration which we "are now asked to make, and they have carried it further "than this section of the bill carries it."

While it was perfectly competent for the continental powers and Great Britain, under their respective forms of government, to build up monopolies and to encourage particular trades and occupations, and to subsidize one occupation more than another; ours is a constitutional government, possessing enumerated powers, and the Congress of the United States has no such power. It was never conferred on Congress to bestow any favors on a class or to inflict any arbitrary deprivation of rights to build up any business or class. Special privileges are always obnoxious, and discriminations for or against persons or classes, are still more so. (Cooley on Constitutional Limitations, 393; *People* v. *The Township Board of Salem*, 20 Mich., 452, and authorities there quoted.) If the object of the law

was to encourage ship building, and to induce capitalists to invest money in this branch of industry, the means used by Congress as a subsidy are wholly unjustifiable under the Constitution of the United States. While Congress might grant the ship-owner a liberal exemption from the operations of any execution issued upon any judgment, over which the federal power extended, it could not relieve him from total or partial *liability* for any act that he or his servants might commit on land to third parties, on account of the destruction of private property through his servants' negligence, simply on the supposed encouragement it might give him to invest his capital in a branch of business which had its home upon the sea, and with which the landsman and his property had no concern; and while it may be desirable that our mercantile marine may be put upon the same footing with Great Britain's, the equalities of rights, privileges and capacities secured by our constitution to the community at large, forbids the legislative branch of the government from conferring special privileges or providing for special persons following some specified trade or employment.

Since the time Great Britain passed the first of these acts, almost every commercial state has adopted similar regulations. Eighteen countries, which include France, Italy, Holland, Spain, Portugal, Turkey, Germany, England, United States, Mexico, Chili, Brazil, Argentine Republic, Hayti, Uruguay, Venezuela, Costa Rica, Greece now make it a part of their maritime law. All these countries, in their ordinance, provide that the limitation shall not extend to any vessel whatsoever engaged in river or inland navigation.

The adoption of these limitations by positive ordinances

subject to these limitations and provisos, raises a fair inference that the general modern maritime laws of these countries were similar to our own up to the time of their adoption.

Whatever might have been the ancient general maritime law is indifferent. It was the general maritime law of the United States at the time of the adoption of the constitution down to the time when the act of 1851 was passed by Congress, that the liability of the wrong-doer for a maritime tort, when a vessel owner, for the acts of his servants required that he should make full satisfaction; and when the act was adopted, that permitted him to limit this liability, it was expressly provided as in the English act and all others, that it should not apply to any vessel of whatever description engaged in river or inland navigation.*

Take the law as we find it stated by the court, in the case of the Providence and N. Y. S. S. Co., cited *supra*, that the provisions of this act are declaratory of the maritime law, the statement of the court must be confined to the case there befon it, which was a case of admiralty and maritime jurisdiction, and the axiom must be, that the proceeding to limit an admiralty liability is one pre-

*In the year 1851, the steam tonnage on the Mississippi river and her tributaries above New Orleans, was far in excess of the steam tonnage on the great lakes, and the tonnage on these waters and the great rivers and bays emptying into the Atlantic and the Gulf of Mexico east of the Mississippi river engaged in inland navigation, was far in excess of that of the ocean. Since then it has steadily decreased, but as late as 1869, the steam tonnage on the Mississippi and its tributaries above New Orleans, amounted to 322,000 tons, and other rivers of the United States, 120,000 tons, making a total of 422,000 tons engaged in steam inland navigation, while on the Great Lakes, and the rivers connecting them and the St. Lawrence river, amounted to about 140,000 tons.

This river navigation could alone be dangerous to persons and things colonizing and locating on the adjacent shores, yet Congress expressly excludes it from the benefits of the statute.

eminently of admiralty jurisdiction; put in this way it compels unqualified assent. When it is sought to carry the doctrine further than the case in hand, and claim that it rules that the proceeding is one preeminently of admiralty jurisdiction when it seeks to limit an exclusively common law liability, or when, as in this case, it seeks to defeat or qualify judgments recovered at common law, the legal mind does not so readily acquiesce, and nothing short of an authoritative decision from this court will so settle the law.

Dr. Lushington tells us that the admiralty jurisdiction does not depend upon the existence or presence of a ship or other maritime thing, but upon the origin of the question to be decided and the locality. (The Volant, 1 Wm. Robb, 388.)

The surrendering of the ship, and her freight then pending under the statute (a proceeding entirely optional with the vessel owner), was never contemplated in a case in which the cause of action was not maritime, and the party injured had not a *lien* upon the *res* and the freight then pending, or any standing himself to maintain a suit in the admiralty court.

A common law liability for a tort on land gives no lien upon a ship or her freight, and no right to a suit *in personam* in admiralty, and if a tender of a vessel and her freight then pending, by means of a trustee, be ceded in satisfaction of the demand in lieu of money, it is a payment of a debt in goods, wares and merchandise, and we had supposed Congress had gone far enough in that direction when under "the power to borrow money" for the defense of the government, it authorized greenbacks

to be made legal tenders without going still further, and instead of gold or silver or greenbacks, a ship owner may discharge his common law obligations by the transfer to a trustee of his interest in a ship sunken or otherwise, and her freight then pending.

Van Horne v. *Dorrance*, 2 Dall., 309.

Respectfully submitted.

ROBERT RAE,
For Petitioners.

to be made legal tenders without going still further, and instead of gold or silver or greenbacks, a ship owner may discharge his common law obligations by the transfer to a trustee of his interest in a ship sunken or otherwise, and her freight then pending.

Van Horne v. *Dorrance*, 2 Dall., 309.

Respectfully submitted.

ROBERT RAE,
For Petitioners.

118-610

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1886.

PHENIX INSURANCE COMPANY ET AL.
vs.
CHAS. E. DYER, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN.

Application for Writ of Prohibition.

IN RE PETITION OF GOODRICH TRANSPORTATION COMPANY TO LIMIT ITS LIABILITY.

REPLY BRIEF FOR PETITIONERS.

ROBERT RAE,
FOR PETITIONERS.

BARNARD & GUNTHORP, LAW PRINTERS, 44 & 46 LASALLE ST., CHICAGO

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1886.

PHENIX INSURANCE COMPANY ET AL.
vs.
CHAS. E. DYER, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN.

Application for Writ of Prohibition.

IN RE PETITION OF GOODRICH TRANSPORTATION COMPANY TO LIMIT ITS LIABILITY.

REPLY BRIEF FOR PETITIONERS.

Respondents rely upon three propositions to defeat the motion for the writ of prohibition prayed for in this case:

First. The statutory rule of limited liability embraces all liability for damage done by the vessel without the knowledge or privity of the owner, whether consummated on land or on water.

Second. The rule thus construed is a maritime rule or regulation which courts of admiralty and maritime jurisdiction have jurisdiction to enforce.

Third. Error of the District court in sustaining the above proposition does not warrant a writ of prohibition; but the mistake, if any, must be corrected on appeal.

The first proposition may be admitted without injuriously affecting the petitioner's right to the writ prayed for. It is true that so broad an interpretation of the statute alone could throw some light on the question in hand in treating upon the jurisdiction of the admiralty court to entertain in the proceeding, for if the statute did not embrace any damage done through the carelessness of the officers and crew of a vessel to dwelling houses situated on land, there would be no pretence for any court or courts to take jurisdiction, and no limitation could be pleaded by the owner of any such vessel to any action brought in any court, and this question could not arise.

If, however, the statute does embrace all liability for damage so done, it does not follow that the admiralty courts can in all cases administer the remedy. We, however, deny that the act of 1851 was intended by its makers to apply to torts committed on land, to the negligence of mariners while navigating their ship. (See original brief for petitioner.)

However that may be, the act confers no jurisdiction upon the district courts as admiralty courts, or courts of equity or common law to adminster the remedy irrespective of how the cause of action arose, nor does the statute create any tribunal, nor does it confer any legal jurisdiction on the existing tribunals; it only declares for the guidance of all courts, state and federal, the measure of the shipowners' liability. The provision in the act for a transfer to a "trustee," it was well said by Mr. Ingersoll *in arguendo* in the case of the City of Norwich (118th U. S., 448) seems to have been intended for the purpose of affording the state or common law courts (and the act of 1851 had its origin in states having similar legislation) a method of

applying the statute analagous to that which is peculiar to the admiralty court.

The language of the act is, "Any court having competent jurisdiction" may administer the remedy.

The second proposition contended for by respondents, that the limitation of liability for damage done by those in charge of a vessel, without the knowledge or privity of the owner, when consummated on land is a maritime rule or regulation.

It is further contended by respondents that if this proposition is true, that the District courts of the United States may take jurisdiction of the case as a maritime one, not maritime by virtue of the general maritime law, but by virtue of the act of Congress, which has changed a common law cause into a maritime one, and that although prior to the act of Congress the case was not a maritime one, Congress is competent to make it such by appropriate legislation and by these means confer exclusive jurisdiction upon the federal courts.

If Congress has the power to so make cases cognizable only at the common law, and tryable alone by the country, maritime causes, it may, with the same propriety and without any violence to its delegated power, make all cases of common law jurisdiction arising in the interior of a country and about matters of bargain and sale of land or crops, when such sales have reference to inter-state commerce and traffic, and thus draw under its power under the constitution, the right to make this jurisdiction exclusive of the State courts and to deprive the parties of the right to the trial by jury, in violation of article VII of amendments to the same instrument.

It is said by the respondents that the *thing* protected is maritime, and therefore the methods and practice is necessarily maritime, and therefore within the admiralty jurisdiction. It is not true, however, that all matters which concern enrolled and licensed ships, either in their modes of transfer, hypothecation or otherwise, are necessarily maritime contracts, for the purchase and sale and mortgage of ships, or the attachment of them to satisfy a common law liability, are not maritime or within the admiralty jurisdiction.

But it is again said, that as Congress could make this limitation of liability without regard to whether the liability grew out of things happening on the land or on the water, it could therefore confer on the federal courts jurisdiction to administer the relief. If Congress has such power, under the grant of judicial power under the constitution, Congress has not in this case done so, and has simply contented itself by authorizing any court of competent jurisdiction to administer the law. It has not said the federal courts should have the jurisdiction, it was not necessary in cases of admiralty jurisdiction for it to in terms say so, nor was it necessary in cases of common law jurisdiction to confer the remedy upon the Circuit courts of the United States where the litigants were citizens of different states.

It is further said by respondent's counsel, that the civil codes of Europe limited the liability of the owners for the contracts and torts of the master to the value of the ship and freight then pending, and that the object protected was the vessel—shipping. That the thing protected is the vessel. While it is true, as stated by counsel, that the codes of Europe since the enactment of the law of Holland [illegible] so limit the liability of the owner, but these

codes also shows that the protection was alone to the owner; the ship was not protected, but the fortunes and the coffers of her owner. The offending thing was punished with condemnation and forfeiture, and either her or her value surrendered to the injured party. The sole purpose of the act of Congress was to limit the personal liability of the owner; it left the vessel to be proceeded against *in rem*, precisely as before the act was passed. The act only operates as a limitation of the personal liability of the owners as distinguished from the liability of the offending vessel herself.

A quotation from the opinion of this court is quoted to show "that the very object of proceedings for limited "liability is to enquire and determine whether the parties "are to be sued at all in any other tribunal."

This quotation clearly shows that the judge who delivered the opinion of the court, referred to a court of appropriate jurisdiction, which could determine the facts in issue, and no other court would be a court of appropriate jurisdiction; and if the proposition of the gentlemen of the other side is true, that there is nothing about the common law that is more sacred against change and modification by a regulation of commerce by Congress than maritime or statutory law, which we admit, and also concede that Congress could so change both the common law and the admiralty in their respective rules in reference to foreign and inter-state commerce; it does not follow that it can make that which is not maritime law such, nor can it change a case of common law into an admiralty one under the constitution, and confer jurisdiction on an admiralty court where none existed by virtue of the constitution. The constitution, at the time of its adoption, fixed forever what is and what is not admir-

alty and maritime jurisdiction. It was this jurisdiction which the several states carved out of their respective sovereignties and conferred on the general government, and this jurisdiction Congress may confer on such inferior courts exclusively, or concurrent with those of the several state courts at its pleasure. Had Congress limited the liability of inter-state telegraph operators, railway companies, and the like, to the value of their stock in trade, this would be a modification of the common law, but it would not authorize Congress to say that the federal courts should have exclusive jurisdiction to enforce such modification irrespective of the citizenship of the parties, and much less so as a regulation of commerce confer jurisdiction upon the admiralty courts to administer.

It is conceded that the party injured in this case could not seek his relief in the admiralty, but is contended the wrong-doer may, because he is a ship owner and his vessel has been the instrument of the wrong. But the act or thing done, which the owner's liability is limited, is the act of the officers and crew, and this without reference to whether the vessel had anything to do with the tort or not. The master or crew may embezzle the cargo, yet the vessel has nothing to do with the theft. So in no sense is the vessel protected, but only the owner.

The appellees further concede that the petitioners—the injured party—could have no standing in admiralty for redress, except at the mere will of the vessel owner and the master, or the servant of the wrong-doer, and a further concession is made, that the case could only get into the admiralty upon the principle that the proceeds were in the admiralty, and therefore the court may take jurisdiction to try a common law contention over these proceeds. The

answer to this is plain. (1) The proceeds did not get into the courts in an admiralty proceeding, but by an attempt to use the Admiralty court for the purposes of limiting a common law liability, which the writ prayed for in a case is sought to prohibit; and, (2) "Though a "proceeding *in rem* and a petition for payment of a "claim out of the proceeds of the same remaining in the "registry are distinct things—the former proceeding on "the ground of a lien—yet no one except an owner is "entitled to payment out of the registry unless he has a "lien on the fund therein. The court can marshal the "fund only between lienholders and owners." The Edith, 94th U. S., 523. Nearly if not every maritime tort occurring through the negligence of the officer or the crew in and about the business of the vessel, gives to the party injured such a lien, yet no lien is given in the case at bar for the injury inflicted to property on land, but which would be given were the property afloat, and the answer to this seeming gross injustice must be because the tort is not a maritime one. It will not be denied that it is quite as important and just that the dwellers on shore, and who do not participate in navigation and directly receive any of its benefits, should have a lien in such cases on the fugitive and transient vessel for the wrong inflicted on him, as is given the party whose property is injured by a maritime trespass.

The third and last point made by the respondents is, that the error of the District court in sustaining the foregoing positions does not warrant a writ of prohibition, but the mistake, if any, must be corrected on appeal.

It is admitted by us that the District court has original jurisdiction of the enforcement of the rule of limited lia-

bility when the subject matter is of admiralty cognizance, and where a case within the maritime jurisdiction presents itself to that court it may decide whether the party is entitled to the benefit of the act or not (the case being a maritime one), and if there be any mistake or error in such ruling, it may be corrected on appeal, and no writ of prohibition will lie. But where the admiralty courts have no jurisdiction, but erroneously take such, it is an usurpation of jurisdiction, and then it is that section 688 of the Rev. Stat. of the U. S. provides that this court may issue writs of prohibition to the District court.

The tort complained of not being a maritime one, and as a consequence the admiralty without jurisdiction, the admiralty court is not competent to herein determine the facts out of which the liability and its limitation grew. It is only such cases as are within the admiralty jurisdiction its courts can properly hear and decide the matter in dispute. *Ex parte* Hager, 104th U. S., 520. *Ex parte* Ferry Co., 104th U. S., 519. *Ex parte* Pennsylvania, 109th U. S., 175.

The court must rightfully get jurisdiction before it can proceed to do this. The case must be of admiralty cognizance. In the case at bar, the vessel was not seized upon any libel filed, no proceedings were in the registry of the court and no cause was pending in such courts; under such circumstances the court can not attempt to take jurisdiction and proceed to assume cognizance of matters over which it has not admiralty jurisdiction and when it does so it falls within the duty of this court under the act of 1789 to issue a writ of prohibition to the District court. (Rev. Stat., 688.)

The writ of prohibition has been used time out of mind

to restrain the admiralty from taking jurisdiction of things occurring on land.

Godolphin Ad. Jur., Cap. 6, p. 71.
Rex v. *Broon*, 12th Mod., 134, 15.
Grant v. *Gould*, 2 H. Black, 69–100.
Stewart v. *Wolf*, 3rd Tr., 347.
Velthasen v. *Ormsbey*, 3 Tr., 315.
1st Comidg., 376.
Ross v. *Walker*, 2d Wilss., 264.
King v. *49 Casks of Brandy*, 3rd Hagg, 280.
The Eleanor Robertson, 6 C. Robertson, 39.
The Public Opinion, 2nd Hagg., 398.
The Eliza Jane, 3rd Hagg., 335.

It is confessed that the District court has no jurisdiction to try the subject matter of the tort in controversy, but it is denied that a mistake in deciding to exercise its jurisdiction will justify a writ of prohibition. The jurisdiction of the admiralty is not general over torts committed on land; it has no jurisdiction whatever, and therefore has no power to decide that the wrong-doer may escape liability on any terms. It neither can give judgment against the defendant for the tort committed, nor satisfy the judgments of common law courts. If it attempts it, it is an usurpation of jurisdiction and not mere error in the general exercise of its powers within the limits of its legitimate jurisdiction, and this usurpation may be prevented by prohibition.

Bradley v. *Fisher*, 13 Wall., 355.
Ex parte Lang, 18th Wall., 163.

In Ex Parte Slayton, 105th U. S., 453, to defeat the

issuing of the writ, it was found necessary to decide that the jurisdiction had been acquired by getting possession in an *appropriate* manner of the *res*, but in the case at bar the only proceeding is that of an attempt to limit the liability of the owner of a vessel by first trying the question of liability in a cause of action over which it has no jurisdiction, and then determining whether the act applies or not. It is necessary, in the first instance, to hear and determine the merits of the case. This the court has not jurisdiction to do, and this application is made for a writ of prohibition, restraining the court from proceeding further. The court can not decide whether the facts justify the relief, and hence is without jurisdiction to administer the relief.

This case, if within the power of the court to grant the writ, appeals strongly to the court for the exercise of its power to do so.

The record shows that the trespass complained of and the liability for which is sought to be limited, occurred on the 26th day of September, 1880, and that litigation has been carried on in some six or seven suits in the state courts of Wisconsin; that many of these suits are still pending and undetermined; that some sixty-seven buildings were destroyed by the fire; that the courts are located at a great distance from the place where the trespass was committed, and that a large number of witnesses on both sides must travel this distance, and are necessary to the trial of the causes. If the writ of prohibition does not issue and the parties have to proceed to try their causes in the admiralty before a United States commissioner, and it should afterwards turn out on appeal to this court that the court was with-

out jurisdiction, it would be far better for the court to say so now, than some three or five years hence, and after a vexatious and expensive litigation has been gone through with, and with such a cloud of witnesses, many of them lost to either side by death or absence. If the case is one of doubtful jurisdiction, then the court may decline to act; if, on the other hand, the court below is without jurisdiction, then the party is entitled to the writ as a writ of right, and it is the duty of this court to put a stop to fruitless, expensive and unauthorized litigation.

ROBERT RAE,
for Petitioners.

A History of the Law of Limited Liability.

Owners of ships and vessels are not liable, under the existing laws of the United States, for losses on board of their ship by fire, unless such fire is caused by the design or neglect of such owner or owners, nor to any loss of precious metals and other valuables on board of such ship or ships where the shipper has neglected to give notice of their character and value as common carriers; nor are such ship-owners liable for embezzlement, loss or destruction of goods on board of their ship by the master, crew, passengers or others, or for loss or damage by collision, or for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owners or owner, in amount exceeding the interest of the value of such owner or owners respectively in such ship or vessel and her freight then pending. By the last section of the Act of Congress, it is declared that such exemption shall not apply to the owner or owners of any canal-boat, barge or lighter, or to any vessel of any description whatever, used in rivers or inland navigation. This latter section is now repealed. This act is entitled "An act to limit the liability of ship-owners, and for other purposes." [1] In these provisions of the statute are sketched in outline a scheme of laws and regulations for the benefit of the shipping interest, the value and importance of

[1] U. S. Stat. 1851, ch. 43.

which to maritime commerce can hardly be estimated. No other interest, vast or insignificant, is so favored. All other interest must bear the burden of just responsibility for its offenses and wrongs. This interest alone is, in one case, that of fire when occurring without the knowledge or privity of the owner, wholly exempt from responsibility for its torts, and in the other cases, enumerated in the statute, responsible only for what remains out of the disaster after inflicting the injury or wrong perpetrated by it.

The courts of the United States administer this statute in what they call "a spirit of fairness," with a view of giving to ship-owners the full benefit of the immunities intended to be secured by it—the encouragements it will afford to commercial operations being of the highest importance; that it should not be administered with a tight and grudging hand, construing every clause most unfavorably against the ship-owner, and allowing as little as possible to operate in his favor; that if the law is so administered, it would hardly have been worth the trouble of its enactment.[1] On the other hand, in the same case, Justices Field and Gray, in a strong dissenting opinion, lay down the rule that "there can be no public policy in ab-
"solving common carriers by water from their full liability
"to others for property which has been entrusted to their
"care, and has been lost by their design or neglect. It
"certainly would require language so clear and plain that
"no subtlety of criticism can escape from the conclusion,
"before such a purpose can be ascribed to Congress. It
"would be establishing a limitation of liability against
"public policy, common right and the universal feeling of
"justice. It would make the law one to protect wrong-

[1] Providence & N. Y. SS Co. *v.* Hill Mfg. Co., 109 U. S., 589.

"doers, and to punish the innocent who had been injured "by them while thus protected." [1] And this is the doctrine in the English courts in *Gale* v. *Lawrie*, 5 B. and C., 156, the Northumbria, L. R. 3, A. & E. 6, 13, the Andalusian, 4 P. D., 157, 3 P. D., 182, 190. This latter view has been taken by a late distinguished law writer in England, Mr. Marsden, in his treatise on the law of Collisions at Sea. In a note on this subject he says (p. 73): "The "history of the singular legislation which enables the "owners and masters to do mischief with ships at a cheaper "rate than is permitted to other people, or with other "instruments, is as follows," etc.:

Whatever may be said of giving this act a liberal construction in the interest of trade and commerce when said in reference to merchandise, ought to be carefully scrutinized when spoken in reference to loss of life or injuries to persons. This distinction and the gravity which induced it caused the limitation in the British statutes of 17th and 18th Vict. c. 104, to creep in, in which it is provided that in case of loss of life the value of the ship should not be taken at less than £15 per ton, or $75 per ton in our currency.[2] To place the loss of life on the same footing with the loss of things, and by which the highest degree of care would be in any way relaxed for the preservation of life, is both unwise and impolitic. On the continent of Europe, publicists have already recognized the peril which has been created by these innovations of natural justice. The Revue Critique de Legislation for 1870 (p. 550) calls the attention of the legislature to this important matter. It has been doubted

[1] Id., p. 606.

[2] Nixon *v.* Roberts, 1 J. & H., 739: Leycester *v.* Logan, 4 K. & J., 725.

whether the statutes of the United States, limiting the liability of the ship owner, applies for claims for damages given by states statutes to the administrators or relatives of a person killed, or claims for personal injuries. Some of the District courts of the United States hold that for such loss of life or injuries the claim for damages therefor are within the provision of the statute limiting liability.[1]

The whole matter is very thoroughly discussed by Judge Benedict in his very able opinion delivered in the case of Epsilon, 6 Ben., 381. In the case of the Mamie (110 U. S. 742), an injunction was sought to stay proceedings begun in a state court before the filing of a libel to obtain the benefit of the limited liability act. The Mamie was a steam yacht engaged in carrying passengers on the Detroit river, and she came in collision with another steamer and sunk, by reason of which several passengers were drowned. Their administrators commenced suit in the state court to recover damages from the owners of the yacht. The owners then commenced proceedings in admiralty in the Eastern district of Michigan, to obtain the benefit of the limited liability act. The District court dismissed the libel on the ground that the vessel was not one of the class described in the act. Appeal was then taken to the Circuit court, where the decree of the District court was affirmed. The owners of the yacht then appealed to the Supreme court. Pending the appeal they prayed for a writ of injunction out of the Supreme court to restrain the prosecution of the suits in the state courts. The Supreme court denied the writ, upon the grounds of

[1] The Amsterdam, 23 Fed. Rep., 112; The Epsilon, , 381; Seawahnaka (*in re* Long Island, etc., Transp. Co., 5 Fed. Rep., 599, 624). See also the Supreme court of Rhode Island, Rounds *v.* Pen. & Stonington SS. Co., 14 R. I. Rep., 17 Am. L. Rev., p. 1.

a doubtful power to issue it, and if it had the power it should not be used in a doubtful case.[1]

No notice was taken of the point that the provisions of the act did not apply to cases of loss of life.

A recent case of considerable interest came before Judge Blodgett in the United States District court for the Northern district of Illinois, in which this question was involved. The schooner Vance in tow of the tug Thomas Hood ahead and the tug M. Shields astern, towing up stern foremost, struck a section of the Adams street viaduct in the Chicago river and demolished it. A number of people standing on the viaduct were injured, but none killed. The owners of the tug petitioned to limit their liability for these injuries as well as for the injury to the viaduct. The first objection to the petition was, the act only applied to maritime torts, and as this was an injury done on land, the cause of action therefor was not within the admiralty jurisdiction. The second objection was, that the tug was a vessel engaged on river and inland navigation, and therefore within the last section of the act. The court held that the exceptions must be overruled on both objections. That that portion of section 4,283 of revised statutes which limits the liability to the owner for any loss, damage or injury by collision, or for any act, matter, or thing, lost, damaged, or forfeited, done, occasioned or incurred, without the privity, etc., of such owner was broad enough to apply to a loss occasioned by such a vessel where the loss itself was on land and was not a maritime loss, and, secondly, that the vessel herself, the tug, was of the class to which the statute is applicable, she being a vessel, at the time, engaged in towing vessels

[1] Revised Statutes of 1789 provides, that no injunction shall issue to any court of a state, except in cases of bankruptcy. (The Prov. & N. Y. S. S. Co., 113 Mass. 495.)

engaged in maritime pursuits and inter-state commerce.[1] The point was not raised that the statute did not apply to personal injuries or death.[2]

By section 4,493 of the revised statutes of United States, it is provided that damages to the person and baggage in cases of explosion, fire, etc., the owner shall be liable for full damages provided the same happened through any neglect or failure to comply with the provisions of law for the regulation of steam vessels or through known defects of the steaming apparatus or of the hull. This act, of course, is to be construed *ad hoc*, to steam vessels, but it has been decided that the provisions of this act merely imposed a further condition of the limitation of liability in those classes of cases, that the injury did not happen by reason of any of the causes mentioned in such section. It was intimated, however, in another case in the Supreme court, that independent of this latter statute, all vessels, whether sail or steam, unseaworthy and of faulty equipment or construction, would not in such cases be within the protection of the statute.[3]

The act of Congress of United States, limiting the liability of vessel owners, was passed in 1851, and stood twenty years on the statute books before a careful scrutiny of its provisions was demanded of the Supreme court. At the December term, 1871, in the case of *Norwich Co.* v. *Wright*, 13 Wallace, 114, an elaborate opinion was rendered giving the history of this class of legislation. The court following in its details the learned opinion of Judge Ware in the case of the Rebecca,[4] where all the learning

[1] In Re Vessel Towing Co., 26 Fed. R., 169, 172

[2] Smith *v.* Sheppard, Abbott on Shipping, p. 501 and note.

[3] The North Star, 106 U. S., p. 29; Sumner *v.* Caswell, 20 Fed. Rep. 249.

[4] Ware's Rep., 187, 184.

on this side of the Atlantic can be found on the subject. It is not the purpose or scope of this article to give a very concise history of the maritime law of modern Europe on this subject. These two cases, together with the case of the *Providence & N. Y. SS. Co.* v. *Hill Mf'g. Co.*, 109 U. S., 589, and a very learned article by Harrington Pitnam, Esq., of the New York City bar, (vol. 17, Am. L. Rev.), and the chapter on this subject found in Mr. Morton P. Henry's excellent work on Admiralty Jurisdiction & Procedure, contain all that is useful on the subject. The history of this class legislation in this country is not concurred in by authors or members of the learned profession on the other side of the Atlantic. While the American courts hold that it originated in the maritime law of modern Europe, the English and continental writers tell us it had its birth in positive legislation; that it is not to be construed *bona fide*, but as of patrician origin, and therefore its provisions are *stricti juris;* and with all due respect and bias for our own courts and their learning, I cannot but be impressed that these writers more correctly state the origin and growth of these peculiar laws.

There is no trace in the maritime codes of the middle ages of any limitation of owners' liability for damage done to other ships.[1] Neither in the laws of the city of Trani, dating from 1063, or in the laws of Oleron of the century following, is any provision found limiting the liability of vessel owners. In 1336, Peter IV of Arrigon declares by regulation that part owners are not responsible for loans negotiated by the master. The consulate of the sea in the fourteenth century, makes no provision of this kind ex-

[1] Twiss' Black Book of the Admiralty, I., 37, 108; II., 229, 449; III., 283, 285, 291; IV., 273, 284, 373, 435.

cept that found in the regulation of Peter IV. The first official promulgation of any such rule was made by the Swedish Stadtlagh in 1618, and Grotius tells us that the law is so in Holland: and so in 1647 Cleirac speaks of the matter and confines it to river navigation, while modern legislation excludes river navigation from its benefit, but all these acts more particularly refer to the master's agreements and causes arising out of contracts, but for the torts of the master in the sphere of his employment, the owner of the vessel was always liable.[1]

This was the condition of the general maritime law in Europe when, in 1734, the Act of seventh George II was passed, limiting owners' liability for loss of cargo by the theft of the master or crew to the value of the ship and freight. It was not till 1841 that the French legislature passed a law relieving the ship-owner from all acts of the master. Prior to that time the law of France but partially exonerated the owner for such acts. Since that time twenty great states have expressly adopted, with greater or less modification, this limitation of liability—England, France, Italy, Holland, United States, Norway, Germany, Sweden, Spain, Portugal, Turkey, Finland, Mexico, Chili, Brazil, Argentine Republic, Hayti, Uruguay, Venezuela and Costa Rica. This question may be pertinently put to those who assert that this limitation was part of the ancient maritime law. If all these twenty countries, comprising the whole of the civilized globe, have found it necessary to modify by special enactment, the whole body of maritime law, upon what locality and in what commercial countries and at what date is the great body of the maritime law to be found, which did limit this liability; if these twenty nations were not the sole important factors whose codes of

[1] Roccus, De Navibus et Naulo, note II.

trade and commerce did not go to make up the body of the maritime law prior to this express legislation, what peoples did? It is more probable that there was no maritime law, properly so called, on the subject, and if there were, there was no limitation, else why find it necessary to limit, and therefore the act of Congress cannot be said to be a modification of the general maritime law.[1] It is purely a municipal regulation of commerce, a regulation we have seen exercised by nearly all sovereignties, whose subjects go down to the sea in ships, and the power of Congress to pass it is found in the commercial grant; and if so, then the power is limited to commerce between foreign nations, inter-state and the Indian tribes, and unless the damages sought to be limited are maritime, admiralty courts will not enforce it. The United States Supreme court in an incidental remark, in the case of the Providence, N. Y., Steamship Co., *supra*, page 589, give it this two-fold foundation, and say it is not only a maritime regulation in its construction, but it is clearly within the scope of the power given to Congress "to regulate com-" merce." Whether the act is constitutional, so far as it attempts to extinguish a liability by a tender of something that is neither silver and gold, and not money, is still an open question. The provision that the acts should not apply to the owner or owners of any canal boat, barge, or lighter, or to any vessel of any description whatsoever used in rivers or inland navigation, is borrowed from the French code, which was the law as early as 1637, and not, as hastily announced by the Supreme court, from the English statutes.[2] It is also found in the

[1] Lloyd *v.* Gucbert, L. R. 1, G. B. 115, 121.

[2] The acts of 1884 and 1886 now extend the limitation to all descriptions of vessels and for all debts contracted on behalf of the vessel, whether such contracts were made by the owner or master. U. S. Stat., Sec. 18, act 1884, Ch. 121; see also act 1886.

British statute of 53d George III c. 59, A. D. 1780, one hundred and forty-three years after its adoption by France. This latter provision became the subject of litigation and construction in the Supreme court of the United States in the case of *Moore et al.* v. *American Transportation Co.*, 24 How., 1; the question was whether the exception as to inland navigation applied to the great lakes, and it was held that it did not. The court held that the words used in river or inland navigation meant "employed," and was intended to refer to vessels solely employed in river or inland navigation. "It was this species of navigation—that "is on rivers and inland—which was intended to be with- "drawn from the limitation of the liability of the owner; "and the addition of the term 'inland navigation,' as an al- "ternative to rivers, was doubtless designed, speaking in "a general sense, to embrace all internal waters, either "connected with rivers, but which did not, in a geograph- "ical or popular sense, fall under that name, or which "might not be connected with rivers, but fell within the "reason or policy of the exception, such as bays, inlets, "straits, etc. Vessels, whatever may be their class or de- "scription, solely employed upon these waters, are usually "employed in the trade and traffic of the localities, carried "on chiefly by persons residing upon their borders, and "connected with the local business, and without the form- "alities and precautions observed in regular commercial "pursuits, with a view to guard against accidents and "losses, such as insurance, bills of lading, etc. It was fit "and proper, therefore, in this description of trade and "traffic, that the common law liabilities of the carrier "should remain unaltered. But the business upon the "great lakes lying upon our northern frontiers, carried on "between the states, and with the foreign nation with

" which they are connected (and this is the only business " which Congress can regulate, or with which we are " dealing), is of a very different character. They form a " boundary between this foreign country and the United " States for a distance of some twelve hundred miles, and " are of an average width of at least one hundred miles; " and this, without including Lake Michigan, of itself 350 " miles in length and ninety in breadth, which lies wholly " within the United States. The aggregate length of " these lakes is over 1,500 miles, and the area covered by " their waters is said to be some 90,000 square miles. " The commerce upon them corresponds with their mag- " nitude. These lakes are usually designated by public " men and jurists, when speaking of them, as great inland " waters, inland seas, or great lakes; and, if Congress in- " tended to have excluded them from the limitation of the " liabilities of owners, it would have been most natural " and reasonable, and, indeed, almost a matter of course, " to have referred to them by a more specific designation."

In the original act, there was a provision that " nothing " in the act should prevent the parties from making such " contract as they pleased, extending or limiting the liabil- " ity of such owner." This clause is dropped out of the revised statutes. Notwithstanding this, the law is still the same, that parties can make such contracts as they please extending the liability of the ship-owner. But the court has decided that this could be only done by express contract, and that too notwithstanding, the vessel owner should set up in his answer to a suit upon a bill of lading for the loss of cargo, that it was received on board with the undertanding that, by usage and custom, he was to be responsible for loss or injury to the cargo caused by the negligence or misconduct of the owner of the vessel or

his servants or agents, and the shipper admits the contract and the usage and custom.[1]

The act is made for the benefit of the ship owner and not for the benefit of the master, officers or seamen, or the public, and it is doubtful whether section 4,281 exempts the owner of the vessel from liability to any shipper of platina, gold, gold dust, silver, or other precious metal, coins, jewelry, bills of any bank, precious stones, gold or silver in manufactured or unmanufactured state, watches, clocks or time-pieces of any description, trinkets, orders, notes or securities for payment of money, maps, writings, title deeds, printings, engravings, pictures, gold or silver plate or plated articles, glass, china, silk in manufactured or unmanufactured state, and whether wrought up or not with any other material, furs or lace, or any of them contained in any parcel or package or trunk which shall be laden as freight or baggage without, at the time of such lading, giving to the master, clerk, agent, or owner of such vessel receiving the same a written notice of the true character and value thereof and having the same entered on the bill of lading therefor. In such case of such omission, the master and owner of such vessel are not liable as carriers thereof in any form; and in case such notice is given and such note made on the bill of lading, the owner or master is not liable for any such goods beyond the value according to the character thereof so notified and entered. Thus it will be seen that in a large schedule of articles shipped and put aboard of any vessel, the limitation of liability does not apply if the bill of lading discloses their condition and value, except as to any excess in value beyond that measured by the bill of lading,

[1] Walker *v.* The Transportation Co., 3 Wallace, 152.

and the limitation is fixed, not by the value of the vessel and the freight then pending, but by the value of the cargo shipped on board as fixed by the bill of lading; and if carried without a bill of lading, or the bill of lading is silent on these subjects, the owner or master are not liable in any form as carriers.[1] There is a further provision that in case the charterer of any vessel shall man, victual and navigate such at his own expense, or by his own procurement, he shall be deemed to be the owner of such vessel, and such vessel when so chartered, shall be liable in the same manner as if navigated by the owner thereof. This section has been held to protect part owners who had chartered the vessel to one of their co-owners who sailed the vessel on shares, hiring his own crew, paying and victualling them, paying half the port charges, retaining half the net freight after the port charges were taken out, and paying to the general owners the other half; and it was further held, the part owner, who was also the charterer, was alone liable in that case, which was one of collision, although sued jointly with his co-owners.[2] In England the weight of authority is to the same effect.[3] Under the law different classes of vessels are either affected by or exempted from its operations. By the first section of the act in cases of loss by fire, the exemption applies only to goods, wares or merchandise shipped or put aboard said vessel. Up to the time that the case of the Providence and New York Steamship Company was decided, 1883, it was assumed that the

[1] Bill of lading described goods as one box containing 248 oz. of gold dust, not good within the act of Victoria (26 L. J. Ex., 69,) property described as 1,338 hard dollars good (70 M. & W.)

[2] Thorp *v.* Hammond, 12 Wallace, 414.

[3] Steel *v.* Lester, 3 C. P. D., 121; Contra: Burnard *v.* Aaron, 31 L. J. C. P., 334.

case of loss and damage by fire on a ship was wholly within the provisions of this section and not within the provisions of the third and fourth sections of the act of 1851. It was contended that this section covers the whole ground so far as liabilities or losses by fire are concerned, and therefore such liability must be impliedly excepted from the relief provided by section 3. But the judges in that case took a different view of it and held that the owners might have the benefit of the third and fourth sections of the act, which did not afford them plenary exemption, but liability only to the extent of the value of the vessel and the freight then pending. The court held that "there was no inconsistency or repugnancy in allowing a partial exemption in cases falling within the third section; that is, cases of loss by fire, happening without the privity or knowledge of the owner. They may not be able under the first section to show that it happened without any neglect on their part; whilst they may be very confident of showing under the third section that it happened without their privity or knowledge. The conditions of proof, in order to avoid a total or partial liability under the respective sections, are very different." But this is met with a sharp criticism that this assumption necessarily involves the conclusion that a fire, caused by the design or neglect of the owner, may occur without his privity or knowledge, which appears to be nothing less than saying that contradictory and inconsistent terms may be appropriately applied to the same transaction. That it could not be contended that an act done by the design of the owner could have been done without his privity or knowledge. It must necessarily have been done with both; and if the fire was caused by the neglect of the owner, it must be presumed to have

been caused with his knowledge. Where one is bound do a thing or to see that certain things are done, he is presumed to know the direct consequence of his carelessness and neglect in those respects. Especially is this so where his doing the thing, or seeing that it is done, is necessary to the safety of life or property. He cannot shield himself from responsibility by saying that he did not know what would be the consequence of his carelessness and neglect. The law presumes that he does know it and intends it. The act speaks of neglect by the owner, not by any subordinate officer or agent. It is therefore personal neglect which is meant, and it would be unreasonable to hold that the owner was ignorant of that which necessarily followed from his own personal conduct. Not only would this be unreasonable, but there is an inconsistency in holding that the first section exempts the owner from all liability in cases of fire happening without his design or neglect, if by the third section a liability is fastened upon him to the extent of the value of the ship and freight in case of a fire occurring without his privity or knowledge. And yet, according to the position of the court, the owner is exempted by the first section from all liability if a fire occur without his knowledge and privity, and by the third section is subjected to liability to the extent of the value of the ship. There are other objections to the construction put up by the Supreme court, to which the space allotted to this article will not permit us to refer. Since this decision the case of the *C., St. P. & M. R. R. Co.* v. *Ross*, 112 U. S., has been decided that the agent in charge of a corporation's cars, is the corporation itself, it raises the question whether a master of a vessel having a like charge of his ship does not represent the corporation owner. (Henry on J. & Proc., p. 302.)

Another class is that of cargo, etc., lost by embezzlement of master, crew, etc., and another class, as we have seen, is that of damages to the person and baggage in cases of explosion, fire or steamship, when occurring through no fault of the owner in construction or equipment.

The most important class is that found in section 4,283 which exempts the owner or owners from any loss, damage occurring by collision, or for any act, matter or thing, loss, damage or forfeiture, done, occasioned or incurred, without the privity or knowledge of such owner or owners. This section is very broad, and gives liberal room for the courts to embrace every matter or thing whereby an injury is occasioned by a vessel by judicial construction as being within the statutes, should not the rule of *noscitur a sociis* apply. The other classes excepted in the operation of the statute are those first of charterers in possession for losses of bullion, precious metals and stones, valuable documents, rich and valuable fabrics and manufacturers when such are not inserted in the bill of lading and their value fixed therein; and last, canal-boats, barge or lighter, or to any vessel of any description whatsoever used in river and inland navigation. This latter class has, by the acts of 1884 and 1886, been repealed. Other classes not enumerated in the statute are made applicable by judicial construction of which we will examine in detail. In England, where the statute is construed strictly because it takes away a remedy—the natural right of the sufferer to compensation—it is held to apply only where the injury is to ship or to cargo or persons on board of a ship, and then only when the injury is caused by improper navigation. For injuries to a pier, owners are liable to the full

extent of the damages,[1] nor does the English act affect charterers in possession.

However diverse legislation in different countries may be on this subject, it for the most part employs one or more of the three following methods of alleviating the ship-owner's burden: 1. Allowing personal responsibility to cease by the ship-owner taking an affirmative step, separating his individual property from the sea venture. 2. The creation of such a separation *ab initio* as to certain classes of liability. 3. A continuing personal liability, measured by some standard, independent to the amount of damages claimable, and to these divisions of legislative action may be added a fourth, the creation of the decisions of the Supreme court of the United States, which, notwithstanding the requirements of the statute, allow the benefits of the statute to be used as a shield without any affirmative steps taken by the ship-owner, and to be set up without limits of time in the progress of a cause as a satisfaction, or a partial satisfaction, of the claim of the successful litigant at the end of a controversy involving the merits of the case. The first involves an abandonment of a ship and freight then pending, and it is said by the French jurist to be required that the ship-owners to rebut any inference of assuming or consenting to an obligation, not as remedies to remove a personal liability which already has attached, and in the language of Mr. Putnam: "The ship-owner's abandon is not precautionary. It is, in effect, a cancellation of pre-existing liabilities. When the consequences of a collision were to be removed, the ship-owner had at first to bring himself strictly within the noxal principles of the civil law." This abandon, Emerigon says, may be in any manner.

[1] 10, 11 Vic., c. 27, S. 74.

Most of the countries in Europe require it to be made by notarial act, and it is so in some of the countries of South America. Under the English statute, the owners of the vessel must institute an action in chancery, and when the ship or proceeds thereof are under arrest in admiralty, for the purpose of determining the amount of their liability, and for the distribution of that sum, in case their ship is held to be in fault for the collision, among the claimants.[1]

It has been held in chancery that before instituting an act for the limitation of liability, the plaintiff (the owner of the defendant ship in the collision action) must admit his liability for damages.[2]

The English and American Admiralty courts hold otherwise.[3]

In the United States it was thought that the formalities required by the statute were necessary to be complied with in order to give the ship-owner the benefit of the limitation, but by rule of court it is provided that the ship-owners desiring to claim the benefit of the limitation of liability may file a libel or petition in the proper District court of the United States, setting forth the facts and circumstances on which said limitation of liability is claimed, and praying relief in that behalf; and thereupon the court, having caused the appraisement to be had of the amount or value of the interest of said owners respectively in the ship or vessel, and her freight for the voyage, shall make an order for the payment of the same into court, or for the giving of a stipulation with sureties for payment thereof into court whenever the same shall be ordered;

[1] 17 and 18 Vict., c. 104, s. 514; 24 Vict., c. 10, s. 13; James *v.* London & S. W. R. R. Co., L. R. 7 Exch. 187; on Appeal Id., 287.

[2] Hill *v.* Audus, 1 K. & J., 263.

[3] James *v.* The London & S. W. R. R. Co., *supra;* the Amelia, Br. & Lush, 151.

or, if the owner shall so elect, the court shall, without such appraisement, make an order for the transfer by them of their interest in such vessel and freight, to a trustee to be appointed by the court under the fourth section of the act. The rules further provide that the ship-owners, making suitable allegations for the purpose, shall be at liberty to contest their liability, or the liability of the vessel, to pay any damages, as well as to show that if liable they are entitled to a limitation of liability, under the act; and that any parties claiming damages may contest the right of the ship-owners to exemption from liability, or to the benefit of a limited liability. Finally, the rules provide that the libel or petition shall be filed and the said proceedings had in any District court of the United States in which the ship or vessel may be libeled to answer for any such loss or damage; or, if the vessel be not libeled, then in the District court of any district in which the owners may be sued; and if the ship have already been libeled and sold, the proceeds shall represent it. The third section and the first two provisions of the fourth section of the Act of Congress contemplate a continuing personal liability, measured by the value of the vessel and freight. The last provision of the fourth section admits of an entire discharge of personal liability. The independence of these provisions is now apparent, and the failure to make the transfer entitles the ship-owner to the measure of accountability of the vessel and freight. The statute has therefore the running fixed liability of the English system, coupled with the option, if constitutional, of a complete discharge, on transferring interest, analogous to the abandon system of the Latin countries. The judicial recognition of the independence of these two alternatives of the statute is but recent. A difficult point has always been to determine

the amount of valuation of ship and freight, when no transfer is made. Is it a fixed and uniform standard, like the English, or is it subject to variation according to depreciating circumstances occurring in the course of the voyage? Judge Story applied the fixed standard of the time when plaintiff's right accrues to the Massachusetts statute.[1]

Judge Kane, in deciding one of the earliest cases under the Federal Act, which arose in July, 1851, held that subsequent loss of the vessel released the owner.[2]

It, however, was not clearly proved in that case that plaintiff's cause of action accrued before the loss of the vessel. In 1859 the Massachusetts Supreme court adopted the value before collision as the limit of liability.[3]

And as late as 1868, Mr. Justice Grier, in the Circuit court, Eastern District of Pennsylvania, held the same view.[4]

In the case of the *Norwich Co.* v. *Wright*, 13 Wallace, 104, it was held that the ship-owners might be discharged by their surrendering or assigning to a trustee for the benefit of the parties injured in pursuance of the fourth section of the act the vessel and freight, although these may have been diminished in value by the collision or other casualty during the voyage; and it seems that if they are totally lost the owners will be entirely discharged. In the case of total loss of the offending defendant vessel her loss pays the damages; or delivery to the waves is tantamount to her surrender in court in case she had survived. The injustice of this rule is obvious. A French

[1] Pope *v.* Nickerson, 3 Story, 398.

[2] Watson *v.* Marks, 2 Am. L. Reg., 157.

[3] Walker *v.* Boston Ins. Co., 14 Gray, 288.

[4] Barnes *v.* Steamship Co., 6 Phila, 479.

writer has said such an abandon is a jest, a veritable mockery.

The Supreme court in the case of the Providence & N. Y. SS. Co., 109 U. S., 598, declined to answer in what court the ship-owner should apply for protection in a case in which the vessel and freight had been totally lost, and no District court has, or can have, possession of any fund to distribute, but suggested that the ship-owner might resort with propriety to the District court in the district in which he resided, or where the vessel perished.

We take it that in all cases where the owners are sued, when sued in the United States courts, these courts are the proper tribunals in which to claim the benefit of the act; and the United States Circuit as well as District courts may administer the remedy.[1] In cases where two vessels are found in fault, and one of the vessels is destroyed, the rule is, if the fault of the lost vessel is without the privity or knowledge of her owners, the latter will only be liable for the amount of their interest in the vessel and her freight then pending; and the entire damages are divided equally between them, and a decree is made of half the difference between their respective losses in favor of the one that suffers most, so as to equalize the burden, and this is so where one of the parties fails to set up his damages in the pleadings. This is now both the law of England and the United States.[2] In case the vessel survives, it is not necessary in the United States that ship-owners should surrender and transfer the ship in order to claim the benefit of the law. This is only one mode of relief. They may plead their immunity, and, if found in,

[1] The Benefactor, 103 U. S., 238.

[2] The North Star, 106 U. S., 17, appendix 705; 7 Appeal cases, 795. Overruling Chatman *v.* The Steam Nav. Co.

or confessing fault, may abide a decree against them for the value of the ship and freight as found by the proofs.[1] Nor are they bound to plead this immunity during a trial of the merits, but may, after decree found, take appropriate proceedings in the District or Circuit court where the suit is pending.[2] Time when a party may be allowed to institute supplemental proceedings to obtain the benefit of the law has never been precisely defined.[3] And it appears from the rulings of the Supreme court in the case of the Benefactor, strangers to the litigation who have taken no part in fixing fault upon the offending vessel may come in and share *pro rata* with the diligent litigant. This is a violation of the law of *prior petens*, and is palpably unjust.[4]

Does the statute require the whole of the interest in the vessel should be transferred, and may such part owners only limit their liability who seek to take advantage of the benefit of the act? The earlier codes that permitted this limitation required that there should be a surrender of the whole interest, but the modern French law departs from the earlier rule of limited liability, and permits a part owner to abandon his separate interest in the ship. Instead of the *totam navem*, of which Voet wrote, the creditor may have to content himself with but a fractional interest of a single defendant who chooses to take that course. This is put on the ground that otherwise one owner might be ruined by the obstinacy of his associates.[5] One running and navigating a ship, *armateur*, who is not

[1] The Scotland, 105 U. S., 25.

[2] The Benefactor, 103 U. S., 239.

[3] The North Star, *supra*.

[4] Woodworth *v.* Ins. Co., 5 Wall., 87.

[5] Bedarride, 1, 293; Desjardins, 2, 87.

owner, cannot abandon the vessel, according to a late ruling of the French court of Cassation.[1] At common law part owners in fault for collision are at law jointly and severally liable as joint wrong-doers. While by the maritime law of the middle ages they were only jointly liable. The statute of the United States says, that the liability of the owner or owners "shall in no case exceed "the amount or value of the interest of such owners in "said vessel and her freight then pending," and this is the present law of England. The act applies to torts as well as contract, and to accidents happening after the voyage is completed, while in port as well as on the high seas. The limitation does not apply in England to damage done to a wharf or pier.[2]

At what time shall the value of the vessel and the freight then pending be ascertained? Mr. JUSTICE STRONG, *in re* Norwich, 17 Blatchf. Cir. Ct., 221, says: "The limit of liability prescribed by the act of Congress "is that it shall in no case exceed the amount or value of "the interest of the owner or owners in the offending ship "or vessel and her freight then pending." This presents the question: At what point of time is the value of the owner's interest to be taken? Is the measure of the owner's liability or its maximum the value of the ship and her freight before the injury was done? or the value at some time subsequent to the injury, when proceedings may be instituted to ascertain its amount? Or is it the value immediately after the fault has been committed, as, for example, in a case of collision immediately following the collision caused by it? The court then held that by the maritime law all that the sufferers by the misconduct

[1] Dalloz, 78, 1; 193.

[2] 1 G. B. D., 547; 2 Appeals, 743.

of an offending vessel were entitled to was the vessel itself after the injury had been committed, together with her freight; that that was the measure of the liability adopted by the act of 1851; that the owners of the steamboat were not liable to the extent of the value of the steamboat immediately before the collision; and that such was the decision in 13 Wall., 104. The steamboat had been raised and repaired, and had become of the value of $70,000 before the petition for a limitation of liability was presented. It was urged that value must be taken as the measure of the owner's liabillty. As to this the court said: "To hold that the owners are liable to the extent of that valuation would be substantially to require them to surrender not only the ship and her freight, but also a sum of money equal to all they expended upon her in raising and repairs. Such, I think, would be a departure from the obvious meaning of the statute, and not required by the maritime law. I cannot doubt that the measure of liability recognized by the maritime law, and by the act of Congress, is the value of the offending ship in the condition in which she was immediately after the disaster, adding the freight. Then the claims of the persons injured arose on the claims which the statute limits. The extent of the limitation is not a shifting one, varying with the times when the protection of the act may be sought, any more than it can be enlarged or diminished by the choice of the mode of obtaining that protection. Certain it is that if, immediately after the collision, the steamboat owners had surrendered the vessel and freight, or transferred them to a trustee, they would have been discharged. Her value and her freight then pending were then all that they were liable for. That was then the extent of their loss. I cannot see that their liability

can be increased by anything that may have occurred thereafter. It is the vessel, as she then was, that could have been transferred in satisfaction of all claims, if the owners had elected that mode of obtaining their discharge. And it is the value as it then was, which is the equivalent of the vessel, that might, then, have been paid in pursuance of an apportionment made by the court. Had the vessel proceeded on her voyage after the collision, and had she met with another disaster occasioned by the fault of the master, by which her value had been greatly reduced, could she then have been surrendered or transferred in full satisfaction of the claims against her, or her owners, arising out of her first fault? Would her value, after the second disaster, have been the measure of the owner's liability? I cannot think such a position can be maintained. Surely such is not spirit of the statute. And if not, it seems equally plain that the liability of the owner is not enlarged by the fact that after the collision the boat has been raised and repaired by them at large expense, or, in other words, has increased in value. The liability of the owner is discharged either by transferring the vessel and freight, or by paying their equivalent; that is, the value of what they might have transferred in discharge, according to the apportionment of the court. The owners have their option of these two modes. They may give up the vessel and freight, or they may retain them and pay their value. But the measure or limits of liability in each case is the same. Very plainly, it is not intended that the creditors shall obtain more when one mode of proceedings is adopted than when the other is followed. But, as I have said, all that the owners are required to transfer is the ship in her damaged condition, as she was immediately after the in-

jury was inflicted.[1] Equivalent to that is her value at that time." The court held that the value of the boat immediately after the collision and fire, as she then was, lying at the bottom, which value was $2,200, together with her pending freight, was the extreme measure of the owner's liablity, and was the amount to be apportioned. There was $600 of pending freight, but as it was wholly lost, and not earned, it was held to have been no value immediately after the collision, and the owner was held not to be liable for it."

The Supreme court, however, in the case of "the Scotland," 105 U. S., 29, say that "our laws adopt the maritime rule of grading the liability of the ship after injury, as she comes into port, and the freight actually earned," etc.

In the case of *Thomasson* v. *Whitwell*, decided by Mr. Justice Blatchford in the Circuit court of the Eastern district of New York in 1882, the justice said: "The question to be determined in the present case is, whether the respondent is freed from the liability he would have been under if the steamer, uninjured by the collision, had safely reached New York, by reason of the fact that she, after such collision, was herself lost during the same voyage from a cause not growing out of such collision." In this case, the British steamship Great Western, which was the offending ship, claimed the benefit of the limitation under the act of Congress, and not the benefit of the British act. This was of the utmost importance to her owners, for under the latter act, they would be liable to the ship which they sunk to the extent of the value of their vessel just prior to the collision, while under the American rule, they would be liable only to the value of the ship and

[1] See also the Atlas, 93, U. S., 307.

freight immediately after the injury, and, if their point was successful, that their vessel was afterward lost during the same voyage from any cause without their knowledge or privity, they would escape liability altogether. Their vessel was underwritten to the extent of her full value, and to obtain the insurance they abandoned the salvage of the wreck to the underwriters. The court in a very elaborate review of all the decisions was of the opinion that the liability of the owners is limited to an amount realized by the sale of the wreck by the underwriter. This is an extreme case. The owners before asking for the benefits of the statute had sold the vessel and therefore had no interest in her or nothing to transfer. A similar decision is found in France in 1832, Dealloz II., 193, and Jacobson's Sea-laws gives a similar case.[1]

The case was appealed to the Supreme court of the United States, and the reasoning of the court below adopted and the decree affirmed.[2] The reason given by the Supreme court that the loss of the vessel is a payment of the debt, is that it would be to punish the unfortunate ship-owner because his loss is total instead of partial. This reason is full of pathos and sentiment, but it is not justice. The innocent ship-owner's property has been destroyed by the negligence of the servants of him who seeks to limit his liability. His own vessel may be wholly covered by insurance at a slight cost of premium. This fund he may retain. Under the present forms of marine policies in England, he may not only insure his own hull, but may insure the liability thrown upon him by reason of any neglect or fault of himself and servants done by his ship

[1] 12 Fed. Rep., 891.

[2] The Great Western, 520, 518 U. S.; The City of Norwich, id., 505; The Scotland ed., 507.

to others. At best it is placing the wrong-doer on equality with the innocent, and in the latter view gives the wrong-doer an advantage over those whom he has injured, to wit: the innocent ship-owner and his underwriters. Such benevolence is a temptation to negligence and tends to weaken the vigilance which the law requires in the use of one's own property when affecting the rights of others.

In consequence of diplomatic correspondence between the great powers in 1874, is was thought that the courts of the United States would declare the act of Congress applicable to all vessels, whether native or foreign. Sir Edward Thornton, minister from England, resident at the United States, pressed upon Mr. Hamilton Fish, who then held the great seals as secretary of state, to declare officially, that the act would be so construed.[1] Lord Stanley was urged by the Liverpool chamber of commerce to settle the point by treaty. By a recent decision in the case of the Scotland, 105 U. S., 24, it so decided in a collision between a British ship and an American ship; and again, in a case of a collision between a British steamship and a Norway barque (12 Fed. Rep., 891); but in this latter case no law of either of the countries to which the vessel belonged was proved as a fact, and the court held that in such a case the provisions of the statute of the United States must govern.

These decisions lack the benefit of reciprocity. An American ship colliding with a British ship, when tried in a British forum, is condemned to pay the damages, if found in fault, on the value of the vessel and freight then pending immediately before the disaster, though the American vessel may have sunk in the collision; while, as we have seen, in the case of the Scotland, if the case was that of

[1] Parl. Papers, 1874, vol. LX, No. 163; do. 1871, vol. LXI, p. 35.

the British ship, her owners, by her loss, would escape all liability.[1] The various acts then belong to the *lex fori* and not to the *jus gentium*. By this the two laws work unjustly and are unequal, and Congress should make some provision to remedy this evil. Both French and German writers have for a long time been of the opinion that the policy of limitation of liability on the part of carriers at sea has been carried too far. That it has acted injuriously on the commerce of the countries adopting it, and has driven cargoes into bottoms where the owners of the ship were under some obligations to take care of them, and if lost by the negligence or want of skill of his servants, to pay for the injury he has done, cannot be doubted. Regnault, a distinguished French judge and writer, attributes the decline of French commerce partly to this cause. Our own merchant marine has for some causes diminished in importance, and it is certainly to the advantage of shippers and passengers to ship their goods, or go themselves, in British bottoms where there is some obligation and some responsibility thrown upon the carrier for loss of life or injury to passengers, which must be contributed for at least seventy-five dollars a ton of the vessel's capacity, then to be turned away without recompense, by a plea that their injury was not caused by the design, neglect or knowledge of the owner, who in most cases is a corporation. No shipper in the west and on the lakes consigning to British ports but must prefer a British ship that gives some protection, rather than an American ship that gives none. Ehrenberg, an eminent

[1] The recent case of the Oregon illustrates this injustice. If the freighters or passengers sued for their respective losses in an English court, they could recover to the extent of the vessel's value *before* the disaster, if the vessel was lost through any default of her officers, &c., but if suit was brought in the American courts, they could recover nothing.

German judge and writer, attributes the rapid decline of French shipping to this cause. "In France, since this "regulation (limiting the liability of vessel-owners), there "has been a rapid decline in shipping on account of the "lightening of the duty of the ship-owner."

Since it is permitted for a carrier by water not only to insure his own hull against the negligence of her master and crew, but also, for a like cause of action, the cargo as bailee, and may also insure the damages he may be called on to pay by reason of a damage done by his own ship to another vessel, either his own or a stranger's, and by that means obtain perfect indemnity against such losses, and the insurance fund cannot be reached by the party injured,[1] there is a strong temptation to negligent navigation and to carelessness in case of cargo and collision. All this the shippers know, and they have no means of providing against it. Ships are of little importance as instruments of commerce if there is nothing for them to carry—no traffic; and why the rights of the owners of produce and other articles of trade should be harassed with additional burdens, while the carrier is released from a public duty, it is for the law-makers to consider and decide. The masters of vessels also are interested. It concerns the dignity of their calling, and weakens as a consequence, their claims to profitable employment. If skilled labor is no longer desirable on account of the absence of a liability for its non-employment, what inducement has the ship-owner, or rather what constraint is there upon the ship-owner, employing inferior masters and paying them cheaper wages? Competency should ever demand a fair price, but by reason of these immunities from liability on

[1] 13 Wall., 117; 12 Fed. Rep., 904; 2 Am. L. Reg., 157; The Great Western, 118 U. S., 520; The Scotland, *supra:* The Norwich, *supra.*

the part of the owner, he may safely employ incompetency --merit must ever go a begging. As this doctrine is to permanently form a principle in the law of carriers by water, and as most of the business done on the great lakes is done in either American or British bottoms, citations have been made liberally from the courts of both of these countries construing and defining their respective statutes.

1182

SEP 24 1886
JAMES H. MCKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM---1886.

PHENIX INSURANCE COMPANY, ET AL.,

vs.

CHAS. E. DYER, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN,

Application for Writ of Prohibition.

IN RE PETITION OF GOODRICH TRANSPORTATION COMPANY TO LIMIT ITS LIABILITY.

BRIEF FOR RESPONDENT.

GEO. G. GREENE,
Of Counsel.

JAS. G. JENKINS, J. T. FISH, F. C. WINKLER
and A. A. L. SMITH,
Proctors for Respondent.

In The Supreme Court of the United States,

OCTOBER TERM---1885.

PHENIX INSURANCE COMPANY ET AL.,

vs.

CHAS. E. DYER, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN.

Application for Writ of Prohibition.

IN RE PETITION OF GOODRICH TRANSPORTATION COMPANY TO LIMIT ITS LIABILITY.

BRIEF FOR RESPONDENT.

THE PROCEEDING.

This is an application by the above named petitioner for a writ of prohibition to restrain the District Court of the United States for the Eastern District of Wisconsin from proceeding further in a cause begun in that court by the owner of the steamboat Oconto to limit such owner's liability under the Limited Liability Act —Sections 4281-4289—R. S. and Rules 54 *et seq.* of the District Courts in Admiralty.

Under this statute and pursuant to these rules such vessel owner filed a petition in said District Court, showing in substance that on the 20th of September, 1880, it was the owner of said steamboat, a vessel engaged in inter-state commerce on the great lakes; that on that day shortly after the Oconto had passed up Fox River, by the City of Green Bay, in the course of a regular voyage, a fire broke out in an old planing mill, on the shore of the river, in that city, which, spreading, consumed in its course sixty-seven buildings and a large amount of personal property, of the aggregate value of more than $100,000; that soon after six actions were commenced against the petitioner by persons whose property was destroyed by the conflagration, claiming damages to an amount exceeding $30,000, which actions are still pending in the State Courts of Wisconsin; that in such actions it is claimed the fire originated from sparks negligently escaping from said vessel while passing up the river, by the planing-mill, on such voyage; that a large number of other persons suffering loss of property by the same fire make the same claim and intend to begin similar actions; that if the fire was caused by the vessel at all, it was without the privity or knowledge of the petitioner; and that the value of the vessel and her pending freight, at the time of the fire, was but $12,400. The petitioner denies liability and asks for the relief provided by the act and rules.

The District Court, after full argument and careful consideration, held that the particular

case thus presented was within the maritime rule of limited liability; and it entertained the proceeding and appointed appraisers pursuant to the rules. At this stage of the proceeding the writ of prohibition is demanded.

That the Oconto was a vessel within the act and that it was not within the exception of section 4289 is undisputed.

Moore vs. Am. Trans. Co., 24 How., 1.
Watker vs. Trans. Co., 3 Wall 150.

That actions to enforce the liability now sought to be limited have been pending for some time in the State courts, and that in one of those actions judgment has gone against the respondent and has been appealed by it to the State Supreme Court, does not affect its right to the benefit of this statute. The beginning and pendency of such actions only go to the question of costs; and the rendition of such judgment if unreversed, merely fixes the amount for which the plaintiff is entitled to share in the distribution.

The Benefactor 103 U. S. 239.

The respondent's propositions are:

First. The statutory rule of limited liability embraces all liability for damage done by the vessel without the knowledge or privity of the owner, whether consummated on land or on water.

Second. The rule thus construed is a maritime rule or regulation which courts of admiralty and maritime jurisdiction have jurisdiction to enforce.

Third. Error of the District Court in sustaining the above propositions does not warrant a writ of prohibition; but the mistake, if any, must be corrected on appeal.

I.

The statute embraces all liability for damage done by the vessel without the knowledge or privity of the owner, whether consummated on land or on water.

The general question for argument and decision is, does damage by a vessel *to property on shore*, without the knowledge or privity of the owner of the vessel, fall within the third specification of liability of section 4283, viz: "For any act, matter or thing, loss, damage, or forfeiture done, occasioned or incurred without the privity or knowledge of such owner?"

The statute and rules relied on by the respondent have been frequently construed and applied by this Court. These decisions require careful consideration in this argument; for while they do not directly declare, the reasoning of the court inevitably leads to the inclusion within the statute of the liability asserted against the respondent.

In *Norwich and N. Y. Trans. Co. vs. Wright*, 13 Wall. 104, it was contended by counsel that the second specification of liability of section 4283, viz: "For any loss, damage or injury by

collision," must be restricted to loss, damage or injury to *goods on board the vessel at fault*, and that this restriction must be carried also to the third specification; and one of the arguments in support of that contention was that otherwise the third specification must have unlimited operation so that injury to property on shore as well as on water would inevitably fall within it. (See p. 587, book 20, Co. Ed., Rept's Sup. Ct., U. S.) But the court said it would not control the generality of the language of the act by interpolating restrictive words, but that the second specification embraces all loss, damage or injury by collision, and the third all other loss or injury whatever.

It was insisted in *Steamship Co. vs. Hill*, 109 U. S., 578, that the case of injury by fire was only within section 4282, and that section 4283 had no application to such an injury. But the court held that damage by fire was within the third specification of section 4283. In this case the damage was to goods on the vessel by fire communicated from the land to the vessel while at a dock. It is decisive of the question here unless a distinction can be made between damage by fire, caused by the vessel on water, and that thus caused on land. This case also determines with much precision and minuteness the nature and effect of the proceeding to limit liability, and by it we were guided on matters of practice in this proceeding.

If the liability sought to be limited was within the jurisdiction of admiralty to enforce, the cases

cited would be decisive to sustain the respondent's proceeding. But while they do not in terms declare that loss or damage *by the vessel* to property on shore without the knowledge or privity of the owner, is within the statute, such is the inevitable effect of the decisions. For in the face of the argument that without restriction the general language of the act includes such loss or damage, they refuse to restrict it, and say that it extends to *all* loss and injury whatever; and they assign a reason and policy for the enactment that requires limitation of liability for loss or damage equally, whether it occurs on land or on water, and wholly irrespective of its being the result of a marine tort or of admiralty jurisdiction. That policy is thus declared: "The great object of the law was to encourage ship-building and to induce capitalists to invest money in this branch of industry. Unless they can be induced to do so, the great shipping interests of the country must flag and decline."

Norwich Etc. Trans. Co. vs. Wright, 13 Wall 104.

Again: "This statute declares the rule which the law-making power of this country regards as most just to be applied in maritime cases. The great carrying trade by land is governed by substantially the same principle: being in the hands of corporate associations, whose members are not personally liable for the acts of the employes, but risk only the amount of their capital stock in the corporation. * * * * * Whenever

the public interest requires the employment of a great aggregation of capital, exposed to immense risks, some limitation of responsibility is necessary in order that men may be induced to contribute to the enterprise. As Grotius says, in reference to this very matter of ship-owners, 'men would be deterred from owning and operating ships if they were subject to the fear of an *indefinite liability* for the acts of the master.' "

The Scotland, 105, U. S., 24.
Moore vs. Am. Trans. Co., 24 How., 1.

Maritime commerce is now carried on largely, if not principally, by steam vessels. The danger of firing property on shore and otherwise injuring it from negligence *by or on the vessel*, is as frequent and imminent as any other danger from such negligence. The consequences of "indefinite liability" to the vessel-owner for such negligence may be as disastrous when the loss is on land as when it is on water. The hardship and impolicy of imposing such "indefinite liability" for losses by fire on land have impelled some courts to seek and find a limitation at common law. Thus in *Ryan vs. Ry. Co.*, 35 N. Y., 216, it being sought to hold the defendant for the burning of a building at some distance from the origin of the fire, which was communicated through the burning of intermediate buildings, the court said: "To sustain such a claim as the present and to follow the same to its legitimate consequences, would subject to a liability against which no prudence

could guard and to meet which no private fortune would be adequate."

See also *Ry. Co. vs. Kerr*, 62 Pa. St., 353.

These cases limit liability to the first building burned. And while they are not generally followed in declaring such a limitation in the absence of legislation, they do state the same reason and necessity for limitation assigned by the Supreme Court for this statute.

In Re. Pet Vessel-owners Towing Company, 26 Fed. Rep. 169 172, Judge Blodgett applied the statute to a case of damage on land by a vessel, although the liability was not enforcible in admiralty. In that case a vessel in tow of a tug struck a viaduct in the City of Chicago, causing a part of it to fall, injuring not only the viaduct, but persons and property on it. The owner of the tug instituted proceedings under the statute for a limitation of liability. The Court says: "It seems to me the purpose of the act was to limit the liability of the owner as to *any* damage his vessel should do without his privity or knowledge, whether the person or thing damaged was upon the water or the land, as the risk of damaging things on the land, especially with a steam vessel, is as great as that of damaging things upon the water."

Aside from these authorities and upon other lines of argument we are brought to the same conclusion.

The contention that the statute must be confined to limitation of liability for loss or damage

consummated on the water must rest on one or both of two grounds:

1. That Congress has not power to limit the exclusively common law liability of the vessel-owner.

2. That Congress did not intend to enact such limitation.

First. The purpose of the rule of limited liability being to promote and encourage shipping, the power to prescribe that limitation is found in the commercial clause of the constitution. Under this clause Congress may regulate navigation as well as traffic, and ships and vessels as instruments of commerce.

Steamship Co. vs. Hill Mfg. Co., 109 U. S., 578.
Lottawana, 21 Wall., 588.
In re Petition Vessel-owners Co., ante.

"Ships and vessels of the United States are the creature of the legislation of Congress. * * * Congress having created, as it were, this species of property, and conferred upon it its chief value, under the power given in the constitution to regulate commerce, we perceive no reason for entertaining any serious doubt but that this power may be extended to the security and protection of the rights and title of all persons dealing in them."

Whites Bank vs. Smith, 7 Wall., 655.

Such being the constitutional justification of the statute it is manifestly competent for Con-

gress, as a question of power, to limit against liability for loss or damage caused by a vessel wherever the injury is consummated.

The power to make the regulation depends upon the thing regulated—commerce—not upon the juridical classification of the thing protected against. The common law is no more sacred against change and modification by a regulation of commerce by Congress, than maritime or statutory law. Each must yield so far as they may be in conflict with such a regulation. The commercial clause applies to commerce on land as well as by water; and regulation of commerce on land would necessarily abrogate or change prior rights and liabilities not within the maritime law at all, but solely founded on statutory or common law.

Second. The next question is, has Congress, by this statute, exercised its rightful power to limit the liability of the vessel-owner for "damage * * done" on shore without his "privity or knowledge?"

If such liability is within both the letter and spirit of the law, an affirmative answer to this question is of course inevitable. Technical rules of construction must be impotent to wrest a case within both the letter and the reason of a law from its operation and protection.

Oates vs. First Nat. Bank, 100 U. S., 239.

And the statute having been enacted on grounds of public policy, to conserve great public

interests, must be liberally construed for the protection of those interests.

Tracy vs. Ry. Co., 38 N. Y., 433.
Hudler vs. Golden, 36 N. Y., 446.
Providence & N. Y. S. S. Co. vs. Mfg. Co., 109 U. S., 588.

The language of the provision in question is as follows: "The liability of the owner of any vessel, for any embezzlement, loss, or destruction by any person, of any property, goods or merchandise, shipped or put on board of such vessel, or for *any* loss, damage or injury by collision, or for *any act, matter, or thing, loss, damage* or forfeiture, *done, occasioned or incurred*, without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending."

From the language of the third clause "for *any* * * *damage done*," etc., *standing alone*, it is clearly impossible to exclude liability for damage to property on shore. To warrant such exclusion requires an exception or qualification radically changing the language, the structure and the import of the provision. To put such a meaning on that language, *standing alone*, would not be construction, but judicial legislation.

This court refused to restrict the statute to goods on board the vessel at fault: "It cannot be read to mean loss or injury (to the goods on board,) without an *unauthorized interpolation*. If

it had said 'loss, damage or injury (thereto) by collision' it would have been confined to the goods on board the vessel. But it does not so read. The section, as constructed, limits the ship-owner's liability in three classes of wrong happening without their privity or knowledge by the fault or neglect of the master or other persons on board. viz: 1, damage to goods on board; 2. damage by collision to other vessels and their cargoes; 3, *any other damage* or forfeiture done or incurred."

Norwich Trans. Co. vs. Wight, 13 Wall, *supra*.

So in *Providence and N. Y. S. S. Co. vs. Hill Mfg. Co.*, 109 U. S., 601, in holding that loss by fire is within the language "for any act, matter or thing, loss, damage or forfeiture, occasioned or incurred" etc., the court remarks: "Why should liability for loss by fire be excepted from the relief here prescribed? It is just as much within the reason of the law as any other liability; and it is within its *terms*. * * * In our judgment the case of loss or damage by fire is comprised within the terms and relief of the third and fourth sections of the act."

It is true, however, that the generality of the language of a particular provision of a statute may be restrained by an intention *gathered from a consideration of the whole statute*. But this statute in its integrity requires no such restriction; it rather exacts, in view of its reason, the unchecked operation of the language used. Note the

general title under which these sections are found. It is "Commerce and Navigation." As protection against liability for damage by the vessel on land is a regulation of commerce competent for Congress to make, limitation of such liability by the provision in question is just as germane to the title as limitation for damage on water. The title of the particular chapter is "The Transportation of Freight and Passengers." As the limitation in question, and indeed, all the provisions of sections 4281 to 4289 are aimed at the protection of the *vehicle or means* of transportation, and not of the freight or passengers transported, such protection is equally germane to the particular title, whether it be against liability for maritime or non-maritime torts. In either case it is a regulation of commerce to protect shipping engaged in "the transportation of freight and passengers."

Proceeding to the body of the statute the other side will doubtless invoke the cognate rules of interpretation *noscitur a sociis* and *ejusdem generis*, to restrain the third specification of liability in section 4283 to liability for damage done on water, or caused by marine torts. It will be claimed that the loss or damage intended by this general language, "any damage done," etc., is to be ascertained by its association with other species of damages; and that following an enumeration of particular kinds or classes of loss or damage, its generality must be restricted by reference to the preceding particular enumeration and so construed as including only other damage

of the like nature, quality or class. And since (thus the argument will run) all the *other* kinds of damage specified in the act are caused by *marine torts* committed and consummated on the water, those intended by the third specification are also for *marine torts*.

But the rules requiring general words to be restricted to things of the same kind or class as those named in the particular preceding enumeration, demand that the things particularly specified, shall be classified or characterized according to some common quality or characteristic that is material and important in view of the admitted object of the law. That object in the case of this statute being to conserve the interests of maritime commerce, by protecting the ship-owner against "indefinite liability," for acts done by or upon the vessel without his privity or knowledge, the quality of the preceding liabilities, in this section, of being for marine torts is wholly accidental and immaterial. "Indefinite liability" for damage by a vessel to property on shore may be as ruinous to the vessel-owner, and hence as detrimental to shipping as such liability for damage on water, as is well illustrated by the case decided by Judge Blodgett, and that presented by this petition. The only common qualities of the other liabilities specified, by which they can be classified with any reference to the purpose of the statute, are that they are for loss or damage caused *by the vessel or on board the vessel* without the knowledge or privity of the owner; and these common qualities also belong to the alleged

liability sought to be limited by the respondents proceeding. Its petition shows that the damage, if caused at all by the vessel, was caused by negligence of those in charge of and upon the vessel, while on a regular voyage, without the privity or knowledge of the owner. A spark escaping from a steamboat may burn property on shore or on the water. It may burn another vessel or by a freak of the wind it may be carried ten feet further and consume a building on shore. It would be a glaring absurdity in the operation of the statute to limit its protection to the first injury. The material query is not, where did the spark happen to light, or where was the damage *consummated*, but did it *originate* from the vessel without the privity or knowledge of the owner? If it so originated it is within the prior kinds of damage, classified according to the purpose of the act to protect innocent vessel-owners from "indefinite liability."

Nor can the rules *noscitur a sociis* and *ejusdem generis* be invoked unless there is a repugnance between the general language and particular provisions, or unless it appears that the unrestricted operation of the general words would be contrary to the probable intent of the legislature. They cannot withdraw a case from the statute that is within both the letter and the reason of the general clause and where its operation would produce no inconsistency, injustice or absurdity. Here "any damage done" to property on shore "without the privity or knowledge" of the owner is as much within the reason of the law, as de-

clared by the Supreme Court, as the particular kinds of damage enumerated. These maxims are employed to save cases from the operation of the statute that are not within the reason; not to exclude cases that are within both the spirit and letter of the law.

Bishop's Written Law, § 246.
Woodworth vs. State, 26 Ohio St., 196.

We have assumed that the loss or damage specified in the first two specifications of liability in sections 4283 *was* exclusively for maritime torts of admiralty jurisdiction. But it is doubtful whether a claim for loss of life by collision, where the right of recovery rests wholly on a state statute, is a maritime tort of admiralty jurisdiction.

Craps vs. Allen, 1 *Sprague*, 184.
Ex. Parte Gorden, 104 U. S. 515-519.

Such loss or damage, however, has always been held within the limitation of liability. Indeed the liability for loss of life by marine disaster was one of the principal reasons for the statute.

Moore vs. Am. Trans. Co., 24 How., 1.
The City of Cotumbus, 22 Fed. Rep., 460.
The Amsterdam, 23 Fed. Rep., 112.

But whether injury causing death is a marine tort of admiralty jurisdiction or not, it is manifestly within the statute, because within both its letter and reason.

The object and spirit of the rule of limited liability is shown by the foregoing discussion and authorities. They also demonstrate, that the liability sought to be limited by the proceeding in the district court is within that object. Besides the present case and that determined by Judge Blodgett, further examples of probable injuries likely to occur show that the spirit of the statute, as well as its letter, would be violated by confining its operation to damage consummated on the water. A vessel's boiler explodes at, or near, a wharf, killing people and damaging property on the vessel and on other vessels and on the wharf. A vessel carelessly runs into a wharf or building, in a river or harbor, injuring persons and destroying property, both on the vessel and on the shore. A vessel is fired by the negligence of the master or crew, and the fire is communicated to one or more other vessels in a harbor, and from them to one or more buildings on land. In these and similar injuries it will be a curious result if, *for the same wrongful act*, the vessel-owner is protected by the statute against the damage on water but not against the damage on shore; especially if in the supposed instance of fire communicated from vessel to vessel, and finally to buildings on shore, the owner is protected against the nearer and more immediate, but not against the more remote, consequences of the same act. If a vessel burns at a wharf, through the negligence of those in charge, destroying goods on board, the owner is within the protection of the

statute. So this Court held in *Providence & N. Y. S. S. Co. vs. Hill Mfg. Co.*, 109 U. S., 578. If the same goods had been on the wharf, not yet loaded or just unloaded, by the contention of the other side the owner would have been unprotected by the statute. As in the example, of fire spreading from vessel to vessel and finally to shore the liability of the owner, by this contention, would increase as the consequence of the wrongful act became more remote, so here it would increase as his duty towards the property damaged diminished.

Whether we look to the language of the statute, its object, or the effects of its application, its intent embraces the case presented by this petition.

II.

The statutory rule of limited liability thus construed, is a maritime rule or regulation which courts of admiralty and maritime jurisdiction have jurisdiction to enforce.

It is contended in support of this writ that if Congress has power to limit and has limited the liability of the owner for damage by the vessel done on land as well as on water, without his privity or knowledge, still the District Court has no jurisdiction of this proceeding in admiralty because the *tort* not being maritime is not of admiralty jurisdiction and cannot be brought within such jurisdiction; and that hence our remedy must be in some other tribunal.

But while the federal courts cannot, under the constitution, be given jurisdiction in admiralty of cases not inherently of admiralty jurisdiction, the maritime law may be changed by Congress.

Lottawana, 21 Wall 558.
Providence & N. Y. S. S. Co vs. Hill Mfg. Co., 109 U. S. 589.

And when a case arises under the maritime law as changed or established by Congress it is a maritime case, although it would not have been before the change, jurisdiction of which belongs to the federal courts as courts of admiralty and maritime jurisdiction. The case of the respondent, then, being within the statutory limitation of liability, if that limitation is a *maritime rule or regulation* whether the damage by the vessel is on land or on water, the *enforcement* of that regulation by the respondent's proceeding must be a *maritime case*. The vice of the contention of the other side that the subject of this proceeding being a tort or the enforcement of liability for a tort not maritime nor of admiralty jurisdiction (*The Plymouth*, 3 Wall., 30,) therefore the proceeding cannot be maintained, consists in the *assumption* that such is the subject of the proceeding; whereas that subject is the enforcement of the limitation of such liability—of the commercial regulation of Congress. That regulation being one which Congress could rightfully make, it must have power to provide for its enforcement; and as it is a regulation of a maritime sub-

ject—ships and shipping or commerce by water—it is a maritime regulation jurisdiction of the enforcement of which Congress may repose in the federal courts under the provision of the constitution that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction. The *rule* is equally *maritime* whether it protects against liability for damage done by the ship on water or on land. It is the thing protected that characterizes the rule, not the thing against which protection is given; and the thing protected being shipping and commerce by water, the rule is maritime. "The rule of limited liability * * is nothing more than the old *maritime rule* administered in courts of admiralty in all countries, except England, from time immemorial; and if this were not so, the subject matter itself is one that belongs to the department of maritime law. The adoption of forms and modes of proceeding requisite and proper *for giving due effect to the maritime rule* thus adopted by Congress, and for securing the ship-owners its benefit, was therefore strictly within the powers conferred on this court."

Providence & N. Y. S. S. Co., vs. Hill Mfg. Co., 109 U. S., 593.

The maritime rule "in all countries except England" thus adopted made no exception of liability for damage done by vessel on land, nor did it require that the liability must spring from

marine torts. Emerigon says: "The owners of the ship are bound *in solidum* for *everything* the captain does in the course of the voyage for the promotion of the voyage. * * * But this action *in solidum* does not exist against the owners further than according to the interest which they have in the body of the ship. * * * It is thus the maritime laws of the middle ages have directed; such is the law which is observed in the north; and such is the regulation of our own ordinance." The French ordinance: "The owners of the ship are responsible for *the acts* of the master; but they become discharged therefrom by abandoning the ship and freight." Valin says: "With these exceptions (contracts for the benefit of the ship) it is just the owner should not be bound for *the acts of the master*, except to the amount of the ship and freight. Otherwise he would run the risk of being ruined by the bad faith or negligence of his captain." Pardessus says: "The owner is bound civilly for *all* the delinquencies committed by the captain within the scope of his authority, but he may discharge himself *therefrom* by abandoning the ship and freight."

Cited from 13 Wall., 104, and 105 U. S., 24.

On these citations the Court says: "By the maritime law, the liability of the ship-owner was limited to his interest in the ship and freight for *all* torts of the master and seamen, whether by collision or *anything else*, and sometimes even for the master's contracts." Again, "The limited

liability of ship-owners was, by the general maritime law extended to *all* acts of the master except contracts for the benefit of the ship, and in most places even to these."

Norwich Trans. Co. vs. Wright, 13 Wall., 104.

These citations are made to show not only that the maritime rule of limited liability by its language and reason included liability for *all* acts of the master and crew, in prosecuting the voyage, but that its maritime character was derived from its object—the protection and promotion of shipping. The rule does not cease to be maritime when applied to liability for an act of the captain and crew on the vessel because the injury is consummated on the land. Its application to such a case protects shipping just as much as would its application to liability for the same act where the same amount of injury was consummated on the water. The rule being maritime, its enforcement may be in the District Court as a court of admiralty and maritime jurisdiction.

The Plymouth, 3 Wall., 30, has no application. As that proceeding was to enforce a liability for a marine tort right to the remedy depended on the maritime quality of the *tort*; while this proceeding being to enforce a maritime regulation against liability for tort right to the remedy depends on the maritime character of the *regulation*.

It is true that the enforcement of this maritime regulation in admiralty in effect compels the

ascertainment and enforcement of these non-maritime claims for damages in the same court. But it often occurs that where the federal courts have no jurisdiction of a claim by itself, if they obtain jurisdiction of some proceeding involving or affecting such claim they acquire jurisdiction, generally exclusive, to enforce the claim itself. Thus a court of admiralty has no jurisdiction to enforce a mortgage of a vessel.

Bogart vs. John Jay, 17 How., 399.

But if that court obtains jurisdiction of the vessel or the fund representing it by the enforcement of maritime liens and claims, the mortgage must be enforced in the same proceeding.

The Guiding Star, 18 Fed. Rep., 263.
The Brig Wexford, 7 Fed. Rep., 674.

So the federal courts have in general no jurisdiction to enforce ordinary debts where the parties are citizens of the same state; but if they obtain jurisdiction in bankruptcy, those debts must be enforced in the federal courts in that proceeding. So here, while none of the persons sustaining loss by this fire could proceed in admiralty to enforce their claims, that court obtaining jurisdiction to enforce this maritime regulation for the protection of shipping, and having the possession of the vessel, or the fund or security that represents it, may, as essential to the enforcement of the regulation and incidental to its jurisdiction of the main subject,

ascertain the claims and apportion the funds amongst them. "The very object of *proceedings for limited liability* is to inquire and determine whether the parties ought to be sued at all in any other tribunal after giving up or submitting to pay the value of all their interest in the ship and freight. * * * In the case before us, as well as in cases of bankruptcy and removal, the parties have a right to have their causes heard and determined by a court of the United States invested with appropriate jurisdiction and capable of affording a proper mode of relief." Again: "The adoption of forms and modes of proceeding requisite and proper *for giving effect to the maritime rule* thus adopted by Congress, and for securing to ship-owners its benefits, was therefore strictly within the powers conferred upon this court. * * * After proceedings have been commenced in the proper District Court in pursuance thereof, the prosecution of distinct suits in different courts, or even in the same court by separate claimants against the ship-owners, is, and must necessarily be, utterly repugnant to such proceedings and subversive of their object and purpose."

Providence & N. Y. S. S. Co., vs. Hill Mfg. Co., 109 U. S., 597.

And again: "It happens every day that the proceeds of a vessel or other fund are brought into that court (Admiralty) to be distributed among those whom it may concern. Claimants are called in by monition to present and substan-

tiate their respective claims; and the fund is divided and distributed according to the respective liens and rights of the parties" (and the rights themselves need not be of federal or admiralty jurisdiction if the court has jurisdiction of some other subject involving their enforcement.) "We have no doubt the District Courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter."

Norwich Trans. Co. vs. Wright, 13 Wall. 123.

By this language the court in substance holds that the District Courts as courts of admiralty and maritime jurisdiction, have jurisdiction of the enforcement of the rule of limited liability, because it is a maritime rule; and having jurisdiction of the enforcement of the rule, they have jurisdiction by the terms of the act of the fund for apportionment and distribution, as in other cases.

By this argument we have endeavored to show—

1. That the statutory rule of limited liability embraces all damages done by the vessel without the privity or knowledge of the owner, whether consummated on land or on water.

2. That the rule thus construed is a maritime rule or regulation.

3. That being a maritime rule or regulation, courts of admiralty and maritime jurisdiction have jurisdiction of its enforcement.

4. Such courts having jurisdiction of the enforcement of the rule, and of the fund representing the value of the vessel, have jurisdiction of

the ascertainment and liquidation of claims on that fund as auxiliary and incidental to their jurisdiction of the main subject.

III.

Error of the District Court in sustaining the foregoing positions does not warrant a writ of prohibition; but the mistake, if any, must be corrected on appeal.

Section 688 of the Revised Statutes provides that this court may "issue writs of prohibition to the District Courts when proceeding in admiralty." The grant of power is permissive; and the propriety of the writ in any case must be determined on general principles.

Washburn vs. Phillipps, 2 Metc. 296-298.

The writ of prohibition is an *extraordinary* legal remedy used to prevent an inferior tribunal from *usurping* jurisdiction or *abusing* power. "It issues only in cases of *extreme necessity*." It is not a writ of right "but rather one of sound judicial *discretion*." Like all prerogative writs it is to be used "with great caution and forbearance * * * where none of the ordinary remedies provided by law are applicable." "It is never allowed except in cases of *usurpation or abuse of power* and not then unless other existing remedies are inadequate to afford relief. If, therefore, the inferior court has jurisdiction of the *subject matter in controversy*, a mistaken exercise of that jurisdiction or of its acknowledged powers will not justify its employment."

High Ex. Legal Rem. § § 762-765-767-770-772
Kenlock vs. Harvey, Harper 508.
Washburn vs. Phillips, 2 Metc. 296.
Ex Parte Greene, 29 Ala. 52.

It will be denied in cases of doubt:

In re Birch. 15 C. B. 743.
The Charkeih, L. R. 8 Q. B. 197.
Washburne vs. Phillips, 2 Metc. 296-299.

And where there is an adequate remedy by appeal:

High Ex. Legal Rem., § § 771-772.
Slate vs. Judge, 21 La. An., 123.
People vs. Circuit Court, 11 Mich., 393.
People vs. Marine Court, 36 Barb., 341.
People vs. Clute 42 How. Pr. 157.
Ex Parte Peterson, 33 Ala., 74.
Ex Parte Warmouth 17 Wall. 64.
Ex Parte Gordon, 104 U. S. 515.
The Charkeih, L. R. 8 Q. B., 197.
Ex Parte Smythe, 2 C. M. & R. 748, 3 A. & E., 719.
State vs. District Court, 26 Minn., 233.
Ex Parte Rountree, 51 Ala., 51.

In this respect it is like mandamus:

High Ex. Leg. Rem., § § 188-189.
Newnans Case. 14 Wall., 165-168.
State vs. Braun, 31 Wis., 600-606.
Ex Parte Brandlacht 2 Hill, 694.
Ex Parte Smith, 34 Ala., 455.

Such being the office of the writ and the limitations of its use it ought not to be granted on this application.

First. The District Court in deciding the respondent's case within the maritime rule neither *usurped* nor *abused* power. It did not *usurp* power; for having general jurisdiction of the enforcement of the rule it of necessity had power to determine its meaning and application. If it erred in the exercise of that power its mistake was not so glaring and indefensible as to amount to an *abuse* of the power.

Jurisdiction of the subject matter is the "power to act upon the general and so to speak, abstract question and to determine and adjudge whether the particular facts call for the exercise of the abstract power." And when a court has jurisdiction of the general subject matter of an action or proceeding it has power to determine whether the facts presented in a particular case make it a "part or instance" of that subject matter.

Hunt vs. Hunt, 72 N. Y., 217-230.
Lange vs. Benedict, 73 N. Y., 12-27.
Tobias Watkins, 3 Pet., 203.
Ex Parte Parks, 93 U. S., 18.
In Re Yarbrough, 110 U. S., 651.
Bradley vs. Fisher, 13 Wall., 335.

The District Court has original jurisdiction of the enforcement of the rule of limited liability. In the exercise of that jurisdiction it must have power to decide whether the rule applies to the particular case; for that question is inherent in every case presented. Prohibition will not go for *usurpation* when the subordinate court erroneously determines that a particular case is within some general subject of its jurisdiction; but only when

it has no jurisdiction of the general subject. In the former case it of necessity has power to decide. In the latter its action is that *usurpation* of power which it is the function of prohibition to prevent.

High Ex. Legal Rem., § 672.

Ruling wrongly that a specific case is within some general subject of its jurisdiction it commits error. Attempting to exercise jurisdiction over some subject matter when it has none it *usurps* power. The error must be corrected by appeal; the usurpation may be prevented by prohibition. If the District Court had no jurisdiction to enforce the maritime rule of limited liability prohibition would be warranted; but having jurisdiction duly invoked to administer that regulation with perfect power to decide whether the special facts fall within the rule a wrong decision of that question is not *usurpation of power* to be restrained by prohibition, but rather *judicial error* to be corrected by appeal.

The distinction is enforced by numerous decisions of this court. "When there is clearly no jurisdiction over the subject matter any authority exercised is *usurped* authority. * * * * But when jurisdiction over the subject is invested by law in the judge or the court which he holds, the manner and *extent* in which the jurisdiction shall be exercised are generally as much questions for his determination as any other question involved in the case." *Bradley vs. Fisher*, 13 Wall., 335. *Habeas corpus* like prohibition cannot be used to correct error but only goes to a lower court pro-

ceeding without jurisdiction. In *Tobias Watkins*, 3 Pet., 203 the court said: "To determine whether the offense charged in the indictment be legally punishable or not is among the most unquestionable of its (the courts) powers and duties." "The question whether it was or was not a crime *within the statute* was one which the District Court was competent to decide. Whether an act charged in an indictment is or is not a crime by the law which the court administers (in this case the statute law of the United States) is a case which has to be met. * * * The court may err but it has jurisdiction. If it errs there is no remedy after final judgment unless a writ of error lies to some superior court." *Ex Parte Parks*, 93 U. S., 18. In the *matter of Yarbrough*, 110 U. S., 651, it is said: "Whether the indictment sets forth in comprehensive terms the offense which the statute describes and forbids and for which it prescribes punishment is in every case a question of law which must necessarily be decided by the court in which the case originates and is therefore clearly within its jurisdiction."

If to wrongly hold that the particular case is within some subject of the court's jurisdiction is merely error when personal liberty is involved, it surely is not usurpation of power when property only is affected. The language of the decisions cited changing its subject states the true doctrine in this case. "Whether the injury set forth in the petition is or is not within the maritime rule of limited liability which the court administers is a

case which has to be met;" "a question of law which must necessarily be decided in the court in which the case originates and therefore clearly within its jurisdiction." "To determine whether the injury is within the rule is amongst the most unquestionable of its (the court's) powers and duties."

Ex parte Lange, 18 Wall., 163, and similar cases do not ignore the distinction between *usurpation* of power and its *erroneous exercise*. They rule that if the court does an unauthorized or prohibited act foreign to the proceeding by which its jurisdiction is being exercised, or after its jurisdiction of that proceeding has terminated *habeas corpus* will issue. So, doubtless, will prohibition. A person cannot be hung by a judgment in ejectment nor can land be recovered by a sentence for murder. Such act, not germane to the proceeding, substantially deprives the party affected of his day in court. It adjudges without legal opportunity for defense. It is *abuse* if not *usurpation* of power. But there is no intimation here but that the District Court will pursue the established order and mode of practice in the proceeding instituted. The only claim is that the case is not within the maritime rule which the court is directed by law to enforce, and to enforce which its jurisdiction has been invoked by due proceeding. The petitioner says the rule does not embrace the particular case because the injury was consummated on land. The respondent insists that it does because the innocent ship owner is within the spirit and letter of the law

wherever the injury was done. The question thus presented is no more jurisdictional than any question of the application of the rule; or than the question of the application of any rule or law which the court is empowered and required to apply and enforce.

Judge Folgar in *Hunt vs. Hunt*, 72 N. Y., 228-229: "Power given to a court, to adjudge divorces * * does give jurisdiction of the subject matter of divorce. Though the proceeding before that court from first to last of the testimony, in an application for divorce, should show that a state of facts does not exist which makes a legal cause for divorce, yet it cannot be said that the court has not jurisdiction of the subject matter. * * * * Jurisdiction of the subject matter does not depend upon the ultimate existence of a good cause of action in the plaintiff in the particular case. * * * * Jurisdiction of the subject matter is power to adjudge concerning the general question involved, and is not dependent upon the state of facts which may appear in a particular case, arising, *or which is claimed to have arisen*, under that general question." In *Lange vs. Benedict*, 73 N. Y., 28, the same judge remarks: "It is the general abstract thing which is the subject matter. The power to inquire and adjudge whether the facts of each particular case make that case a part or an instance of that general thing—that power is jurisdiction of the subject matter."

The same general doctrine is declared in cases of prohibition. In *The Charkesh*, L. R. 8 Q. B.,

197, prohibition was asked because, the vessel belonging to the Turkish navy, a court of admiralty had no jurisdiction of the claims against her for damage by collision. The court said: "It does seem to me that the court of admiralty has jurisdiction to determine the facts and to decide whether international and maritime law do allow the circumstances stated to be a defense to a claim against the Charkeih."

In *Ex Parte Gordon*, 104 U. S., 515, it was sought to prohibit a District Court from proceeding in admiralty to enforce a claim against a vessel for loss of life by collision, on the ground that such an injury was not a marine tort of admiralty jurisdiction. It was held it was the right of the District Court to decide that question. It had general jurisdiction of the enforcement of claims for marine tort, and must therefore determine whether the case presented was one of marine tort.

See also Ex Parte Ferry Co., 104 U. S., 519.
Ex Parte Hagar, 104 U. S., 520.
Ex Parte Pennsylvania, 109 U. S., 174.

In *Ex Parte Gordon* stress is put upon the court's having jurisdiction of the collision and the vessel; but having such jurisdiction the question was whether the particular case was within its jurisdiction of the general subject, to wit, the enforcement of claims for marine torts. Here the District Court has jurisdiction of the proceeding for the enforcement of the maritime rule; and the question is whether the special facts constitute a case within the general subject of jurisdiction.

In *Ex Parte Slayton*, 105 U. S., 453, prohibition was asked against a proceeding to limit liability. The court said: "We cannot on an application for a writ of prohibition determine what shall be the effect of any judgment of the District Court *while exercising its rightful jurisdiction*, neither are we to determine in this form of proceeding what persons, or what classes of persons, are entitled to the fund in hand. All these are questions to be settled in some other way than by prohibiting the court from proceeding under the jurisdiction it has acquired by getting possession, in an appropriate manner, of that which, *according to the claim of the owner*, represents the extent of his liability or that of his vessel."

Had this vessel, by the same fire, destroyed property on both land and water the District Court would have undisputed power to declare what portion of the damage on water is within the maritime rule. It must have the same power as to the damage on land. As a question of power it may manifestly include or exclude all or any part of the damage *claimed* to be within the limitation. To deny this is to assert that it may determine what damage is within the limitation only when it rules *correctly* but is an usurper if it rules wrongly; that while compelled to decide, it only has power to decide *one way*. And in the supposed case the rule as to land damage would have to be enforced if at all in the District Court; for limitation and distribution on the two kinds of damage could not proceed in independent tribunals.

The power of the District Court must be equally comprehensive when the damage is wholly on either land or water; for the power to determine whether certain damage is within the limitation cannot depend on there being some other damage. It is not the validity of the vessel owner's claim that gives jurisdiction of the proceeding. Such jurisdiction depends on the relief demanded—not on the facts alleged to justify it. If the court has general jurisdiction to grant the relief sought it has jurisdiction of the proceeding and hence power to decide whether the facts justify the relief. A court of equity has jurisdiction of an action to remove cloud on title although the alleged encumbrance is no cloud. A court of admiralty has jurisdiction of a proceeding *in rem* for a marine tort although the tort is not marine and of a proceeding for limitation of liability although the liability is not within the maritime rule. The court's general jurisdiction to remove cloud and enforce claims for marine torts and limitation of liability being invoked, in these instances, by due proceeding, it has power to determine whether, upon the facts alleged, the relief prayed for is authorized by the law which it is required to administer.

That a court exercising jurisdiction over some general subject has power to determine what that subject embraces is, of course, inapplicable if its only jurisdiction of the general subject depends upon an unconstitutional or void statute. But whenever the statute granting such jurisdiction is valid the power to construe is necessarily cor-

relative to the duty to apply and enforce. The construction of the subordinate court may not agree with that of its superior, but its right to construe is quite as unimpeachable. It has the same power to include that it has to exclude the particular case by construction; and erroneous inclusion no more justifies prohibition than erroneous exclusion warrants mandamus. Power to decide wrongly and rightly must always coexist; and wrong decision, granted power to decide, must be righted by appellate review.

It is said the District Court decided not only that the statute embraces the respondent's case but that the case is within its jurisdiction of the enforcement of the maritime rule. But it was confronted with both questions. If the statutory rule as to some cases within it is and as to others is not maritime the District Court has jurisdiction of the enforcement of the rule in all cases where it is maritime; and when that jurisdiction is called into activity is required and compelled to decide every question on which the inclusion of the case in hand within that general subject depends. If there was no statute, or the statute had merely invested the District Court with authority to administer the maritime rule, without changing or defining it, that court would have power to adjudge that the respondent's case is or is not within its operation. That power is not affected by statutory change in the scope of the rule. Such change only adds another question for decision.

It may be objected that by this process of inclusion a court may be given jurisdiction of every case; since a party need only insist in due form that his case is within some general subject of jurisdiction to confer power to determine it. Possibility of error is of course inseperable from the exertion of authority. The safety against universal error in the use of this power is in the system and means by which judicial power must be exercised. Since original jurisdiction must be exerted by a proceeding peculiar to the subject matter and the relief demanded, there can be no motive to invoke a court's jurisdiction of some general subject unless the appropriate proceeding will afford the desired relief in the particular case. If it will the court which in the first instance must administer the law is presumably competent to construe and apply it. Presumably it will do so correctly. Its error may in general be rectified by appellate review. Such correction is as effectual as if obtained by prerogative writs.

We have shown that because the subordinate court had power to determine the extent and application of the maritime rule it did not and could not *usurp* that power. That it did not *abuse* the power thus possessed is equally manifest. It seems the *abuse* of power which prohibition will reach never embraces mere error in the exercise of rightful judicial power, but signifies merely *excess* of power in exercising lawful jurisdiction over some general subject; as when a court does something foreign to the proceeding by which it is exerting that jurisdiction. But whether error

writ must therefore be refused unless the decision of the District Court is a plain and clear usurpation or abuse of power. And even if it is such usurpation or abuse it must be corrected by appeal and not by prohibition if appeal will reach it. To warrant the extraordinary there must be no ordinary remedy. The absence of the ordinary remedy by appeal is as indispensible to authorize the writ as the existence of usurpation or abuse of power.

The petitioner's remedy by appeal is adequate. Application for prohibition, it is true, may obtain a more speedy decision of this court and if sustained save the expense of a trial. But the delay and expense of the pursuit of an *ordinary* does not warrant resort to an *extraordinary* legal remedy. It would be quite desirable if every mistake in a judicial proceeding could be speedily, inexpensively, and finally rectified, before the cause proceeds further; but the inevitable delay, expense and confusion, of intermediate correction, and the multiplicity of appeals it would encourage forbid its allowance, and require that intervening errors be reviewed by a single appeal or writ of error from final judgment. There is the same objection to the correction of such errors by prerogative writs that precludes intermediate appeals. The present application affords an apt illustration. It has delayed the progress of the cause in the District Court for nearly a year. But for its interference the cause could have been tried and this question decided by the Circuit Court on appeal during the period of in-

terruption. Finally, to substitute remedy by prohibition for that by appeal whenever it is speedier, or will save a trial if granted, totally abrogates the universal rule that the writ will not lie when remedy by appeal exists. Procedure by writ being direct, summary and before judgment, is always more swift than by appeal; and being always applied for before trial will, if granted, always prevent it. So if mandamus can be used in place of appeal whenever it is more expeditious it may always be substituted if otherwise appropriate. A subordinate court might thus be stopped by prohibition or driven by mandamus, in all cases where these extraordinary remedies are otherwise proper, notwithstanding the existence of remedy by appeal.

All the reasons on which the writ is usually refused concur in this application. The District Court has general jurisdiction of the subject of the proceeding and is competent to and must decide whether or not it embraces the particular case; any error in ruling that question may be reviewed on appeal; and such error is not that bald and manifest usurpation of jurisdiction that warrants the employment of this extraordinary legal remedy.

GEO. G. GREENE,
Of Counsel.

JAS. G. JENKINS, JNO. J. FISH,
FRED. C. WINKLER and A. A. L. SMITH,
Proctors for Respondent.